TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 645.

[redacted]

PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[redacted]

(16,000)

(24,389)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 645.

J. J. BROLAN, JOSEPH McKENNA, G. B. BALK, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print
Caption	*a*	1
Præcipe for record	1	1
Stipulation as to præcipe	3	2
Stipulation as to record	4	3
Indictment	7	4
Minute entries	21	12
Arraignment of Bradbrook *et al*	21	12
Arraignment of Wright	22	13
Arraignment and plea of Soo Hoo Fong	23	13
Pleas	24	14
Bill of exceptions	25	14
Testimony of Manuel Joseph	26	15
C. J. Reay	30	17
J. G. Mattas, Jr	33	19
John McGough	33	19
Alexander J. Taylor	35	20
Leong Duck	36	21
Richard C. Rush	38	22
Charles A. Stephens	38	22
Joseph Head	39	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1914.

	Original.	Print
Testimony of Charles Hughes	46	27
Edwin H. Meyer	46	27
Charles May	46	27
J. J. Brolan	47	27
P. W. Craigie	48	28
G. B. Balk	49	29
E. E. Vargas	50	30
E. J. Gallagher	52	31
Elias Ellison	53	32
Soo Hoo Fong	55	32
Instructions to jury	56	33
Defendants' requests to charge	70	41
Verdict	83	50
Motion in arrest of judgment	84	50
Notice of presentation of bill of exceptions	89	53
Stipulation as to bill of exceptions	90	53
Order making bill of exceptions part of the record	91	54
Minute entry of verdict	92	54
Verdict as to Bradbrook *et al*	95	56
Gallagher	96	56
Balk	97	57
Vargas	98	57
Ellison	99	57
Craigie	100	58
Soo Hoo Fong	101	58
Brolan	102	58
Motion for a new trial	103	59
Motion in arrest of judgment	106	61
Order denying motions for new trial and in arrest of judgment	111	64
Judgment	113	65
Petition for a writ of error	116	66
Assignment of errors	118	68
Order allowing writ of error, etc	138	80
Writ of error (copy)	139	80
Citation and service (copy)	141	81
Stipulation and order settling bill of exceptions	143	82
Stipulation as to bond	144	83
Clerk's certificate	145	83
Writ of error	146	84
Clerk's return to writ of error	149	85
Citation and service	150	85

a In the District Court of the United States for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al.

1 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Præcipe (for Record on Writ of Error).

To the Clerk of said Court:

Please make return of the Writ of Error issued by transmitting to the Supreme Court of the United States true copies each of the following:

Indictment filed October 2, 1913;
Arraignment of defendants October 6, 1913;
Plea of not guilty;
Verdict of guilty;
Minutes of Court fixing bond of each defendant;
Minutes of Court showing hearing on motion for new trial;
Minutes of Court denying motion for new trial;
Motion for arrest of judgment;
Minutes of Court denying motion for arrest of judgment;
Judgment and sentence;
Bill of Exceptions;
Petition for Writ of Error;
Order allowing Writ of Error and Supersedeas;
2 Stipulation showing approval and filing of cost and supersedeas bonds;
Stipulation as to Præcipe;
Præcipe;
Assignment of errors;
Writ of Error;
Citation;
Stipulation as to what the transcript on appeal shall include in the Supreme Court of the United States;
Stipulation and Order of court that Bill of Exceptions might be settled, allowed and filed during July term of above-named District Court;

(2.) That the time in which to settle and file Bill of Exceptions has been duly and regularly extended by stipulations and Orders of the above-entitled court from time to time and including September 20, 1914;

(3.) That the return day of the citation and the Writ of Error has been enlarged from time to time by the orders of the above-entitled court, duly and regularly made to and including October 15th, 1914.

BERT SCHLESINGER,
JOHN L. McNAB,
P. S. EHRLICH,
Attorneys for Defendants.

3 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Stipulation (as to Præcipe).

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys, that the præcipe, a copy of which is hereunto annexed, shall be the præcipe issued to the clerk of the District Court in the above-entitled action for the plaintiffs in error and the defendant in error.

Dated: San Francisco, California, Sept. 22, 1914.

JNO. W. PRESTON,
United States Attorney.
BERT SCHLESINGER,
J. L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

(Endorsed:) Filed Sep. 25, 1914, W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

4 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

(*Stipulation as to Record.*)

It is hereby stipulated by and between the parties hereto through their respective attorneys:

(1) That the following designated papers, together with original citation and original Writ of Error and all the plaintiff's and the defendants' exhibits, comprise all the papers, exhibits, depositions or other proceedings which are necessary to the hearing of said cause upon Writ of Error in the Supreme Court of the United States and that only such papers need be included in the record of said court:

Indictment filed October 2, 1913.
Arraignment of defendants October 6, 1913.
Plea of not guilty.
Verdict of guilty.
Minutes of Court fixing bond of each defendant.
Minutes of Court showing hearing on motion for new trial.
Minutes of Court denying motion for new trial.
Motion for arrest of judgment.
Minutes of Court denying motion for arrest of judgment.
Judgment and sentence.
Stipulations and orders extending time to file proposed
5 Bill of Exceptions to and including September 20th, 1914.
Bill of Exceptions.
Petition for Writ of Error.
Order allowing Writ of Error and supersedeas.
Stipulation showing approval and filing of cost and Supersedeas bonds of defendants.
Assignment of errors.
Writ of Error.
Citation.
Stipulations and orders of the above entitled court enlarging return day of citation from time to time to and including October 15, 1914.
Stipulation as to what the transcript on appeal shall include in the Supreme Court of the United States.
Stipulation and order of court that Bill of Exceptions might be settled, allowed and filed during July term of above named District Court.

(2) That it shall not be necessary to print the exhibits in the above entitled action, but copies of said exhibits which are in writ-

ing may be attached to said record by the clerk and forwarded to the Supreme Court of the United States.

(3) That the time in which to settle and file Bill of Exceptions has been duly and regularly extended by stipulations and orders of the above entitled court from time to time to and including September 20, 1914.

(4) That the return day of the citation and the Writ of Error has been enlarged from time to time by the orders of the above entitled court, duly and regularly made to and including
6 October 15, 1914.

JNO. W. PRESTON,
U. S. District Attorney.
BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

Due service and receipt of copy of the within is hereby admitted this 2nd day of Sept. —14.

JNO. W. PRESTON,
U. S. Dist. Att'y.

(Endorsed:) Filed Sep. 2, 1914. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

7 (*Indictment.*)

In the District Court of the United States in and for the Northern District of California, First Division.

At a stated term of said Court begun and holden at the City and County of San Francisco in the State and Northern District of California on the second Monday of July in the year of our Lord One thousand nine hundred and thirteen.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: that Harry Bradbrook, J. J. Brolan, W. H. Brennan, G. B. Balk, E. E. Vargas, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, Joseph McKenna, A. J. Taylor, C. G. Reay, John McGough, Manuel Joseph, Tam Fai, Young Tai, Soo Hoo Fong, hereinafter called the defendants, heretofore, to wit, on the thirtieth day of May, in the year of our Lord One thousand nine hundred and ten, at the City and County of San Francisco in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly, and feloniously conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

Violation Sec. 37, C. C. U. S., and Act Feb. 9, 1909.

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons whose names are as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly import and bring into the United States at
8 the port of San Francisco, in the State and District aforesaid, and assist in so doing, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid unknown, and for that reason not herein set forth, contrary to law.

That said conspiracy, combination, confederation and agreement between the said defendants and the said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, was continuously throughout all of the time from and after the said thirtieth day of May, in the year of our Lord One thousand nine hundred and ten, and at all of the times in this count of this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this count of this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said J. J. Brolan and Manuel Joseph, on June 19th 1910, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamship "Siberia" about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Tam Fai, P. W. Craigie, and E. E. Vargas, on the 12th day of December 1912, at the City and County of San Francisco in the State and Northern District of California, removed
9 from the Steamship "Tenyo Maru," about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, John McGough, Elias Ellison, and Joseph McKenna, on the 14th day of January, 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamship "China," about one hundred and eighty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, E. E. Vargas, Elias Ellison, Charles G. Reay, on the 5th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Mongolia" a quantity of opium, the exact amount of which is to the Grand Jurors unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, P. W. Craigie, and A. J. Taylor, and a Chinese Interpreter whose name is to the Grand Jurors unknown, on the 9th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Chinyo Maru," about one hundred and eighty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish
10 the object thereof, the said C. G. Reay and E. J. Gallagher, on the 9th day of February 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Mongolia," about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said G. B. Balk, on the 15th day of February 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Tenyo Maru," about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said W. H. Brennan, on the 17th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from some Steamer to the Grand Jurors aforesaid unknown, about ten cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Max Miller, E. J. Gallagher, P. W. Craigie, and Tam Fai, on the 20th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Tenyo Maru," about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish
11 the object thereof, the said Manuel Joseph, Max Miller, E. E. Vargas, John McGough, and Harry Bradbrook, on the 25th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Persia" about two hundred and thirty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Max Miller and John McGough on the 25th day of February 1913, at the City and County of San Francisco in the State

and Northern District of California, removed from the Steamer "Persia" about forty-five cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Elias Ellison, Max Miller, and John McGough, on the 25th day of March 1913, at the City and County of San Francisco in the State and Northern District of California, removed a quantity of opium, the exact amount of which is to the Grand Jurors aforesaid, unknown, from the Steamer "Siberia."

And the Grand Jurors aforesaid on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay and Soo Hoo Fong, on the 25th day of March 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Siberia" about ten cans of opium.

12 And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay and G. B. Balk, on the 4th day of April, 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Manchuria" about forty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay, Max Miller, Young Tai and Tam Fai, on the 10th day of May 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Tenyo Maru," about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Max Miller, C. G. Reay, Elias Ellison, and E. E. Vargas, on the 22nd day of June 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Manchuria" about 210 cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay, Soo Hoo Fong, and Harry Bradbrook on the 17th day of August 1913, at the City and County of San Francisco, in the State and Northern District of California removed from the Steamer "Siberia" about one hundred cans of opium.

13 And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Elias Ellison, A. J. Taylor, Max Miller, E. E. Vargas, G. B. Balk, E. J. Gallagher, on the 20th day of June 1913, at the City and County of San Francisco in the State and Northern District of California,

contributed the sum of Twelve hundred and twenty-five (1225) Dollars for the case of John Marney, indicted for smuggling opium, One thousand (1,000) Dollars of which was to be used for his bond and the balance of Two hundred and twenty-five (225) Dollars was to be used for other expenses in connection with his defense.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, on the 1st day of January, 1912, at the City and County of San Francisco in the State and Northern District of California, G. B. Balk assumed the name of "Black," C. G. Reay assumed the name of "Johnson," Elias Ellison assumed the name of "Smith," Manuel Joseph assumed the name of "Mac," E. E. Vargas assumed the name of "Sam," W. H. Brennan assumed the name of "Nichols," Max Miller assumed the name of "Leo," John McGough assumed the name of "Harry," and J. J. Brolan assumed the name of "Tom."

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Second Count.

And the Grand Jurors aforesaid, on their oaths aforesaid,
14 do further state: That Harry Bradbrook, J. J. Brolan, W. H. Brennan, G. B. Balk, E. E. Vargas, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, Joseph McKenna, A. J. Taylor, C. G. Reay, John McGough, Manuel Joseph, Tam Fai, Young Tai, Soo Hoo Fong, hereinafter called the defendants, heretofore, to wit, on the thirtieth day of May in the year of our Lord One thousand nine hundred and ten, at the City and County of San Francisco, in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together and with said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, contrary to law, and which said opium prepared for smoking purposes would be, as each of the defendants then and there well knew, opium which had been theretofore imported into the United States contrary to law, from some foreign port or place to the Grand Jurors aforesaid, unknown.

That said conspiracy, combination, confederation and agreement

between the said defendants and the said divers others per-
15 sons whose names are, as aforesaid, to the Grand Jurors unknown, was continuously throughout all of the time from and after the said thirtieth day of May in the year of our Lord One thousand nine hundred and ten, and at all of the times in this count of this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this count of this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said J. J. Brolan and Manuel Joseph, on June 19th, 1910, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Siberia," about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Tam Fai, P. W. Craigie, and E. E. Vargas, on the 12th day of December, 1912, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Tenyo Maru," about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, John McGough, Elias Ellison, and Joseph McKenna, on the 14th day of January, 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "China," about one hundred and eighty cans of opium.

16 And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, E. E. Vargas, Elias Ellison, and Charles G. Reay, on the 5th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Mongolia", a quantity of opium, the exact amount of which is to the Grand Jurors unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, P. W. Craigie, and A. J. Taylor, and a Chinese Interpreter whose name is to the Grand Jurors unknown, on the 9th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Chinyo Maru", about one hundred and eighty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combina-

tion, confederation and agreement, and to effect and accomplish the object thereof, the said C. R. Reay, and E. J. Gallagher, on the 9th day of February 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Mongolia", about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said G. E. Balk, on the 15th day of February 1913, at the City and County of San Francisco, in the
17 State and Northern District of California, removed from the Steamer "Tenyo Maru", about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said W. H. Brennan, on the 17th day of February 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from some Steamer to the Grand Jurors aforesaid, unknown, about ten cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Max Miller, E. J. Gallagher, P. W. Craigie, and Tam Fai, on the 20th day of February 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Tenyo Maru", about sixty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Max Miller, E. E. Vargas, John McGough, and Harry Bradbrook, on the 25th day of February 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Persia", about two hundred and thirty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Max Miller and John McGough, on the 25th day of February 1913, at the City and County of San Francisco
18 in the State and Northern District of California, removed from the Steamer "Persia," about forty-five cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Elias Ellison, Max Miller, and John McGough, on the 25th day of March 1913, at the City and County of San Francisco in the State and Northern District of California, removed a quantity of opium, the exact amount of which is to the Grand Jurors aforesaid, unknown, from the Steamer "Siberia."

And the Grand Jurors aforesaid, on their oaths aforesaid, do fur-

ther state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay and Soo Hoo Fong, on the 25th day of March, 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Siberia" about ten cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay and G. B. Balk, on the 4th day of April 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Manchuria" about forty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay, Max Miller, Young Tai and
19 Tam Fai, on the 10th day of May 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Tenyo Maru," about twenty cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Max Miller, C. G. Reay, Elias Ellison, and E. E. Vargas, on the 22nd day of June 1913, at the City and County of San Francisco, in the State and Northern District of California, removed from the Steamer "Manchuria," about two hundred and ten cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said C. G. Reay, Soo Hoo Fong, and Harry Bradbrook, on the 17th day of August 1913, at the City and County of San Francisco in the State and Northern District of California, removed from the Steamer "Siberia" about one hundred cans of opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Elias Ellison, A. J. Taylor, Max Miller, E. E. Vargas, G. B. Balk, E. J. Gallagher, on the 20th day of June 1913, at the City and County of San Francisco, in the State and Northern District of California, contributed the sum of Twelve hundred and twenty-five (1225) Dollars for the case of John Marney, indicted for smuggling opium, One thousand (1,000) Dollars of which was to be used for his bond and the balance of Two hundred and twenty-five (225) Dollars was to be used for other
20 expenses in connection with his defense.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish

the object thereof, on the 1st day of January 1912, at the City and County of San Francisco in the State and Northern District of California, G. B. Balk assumed the name of "Black," C. G. Reay assumed the name of "Johnson," Elias Ellison assumed the name of "Smith," Manuel Joseph assumed the name of "Mac," E. E. Vargas assumed the name of "Sam," W. H. Brennan assumed the name of "Nichols," Max Miller assumed the name of "Leo," John McGough assumed the name of "Harry," and J. J. Brolan assumed the name of "Tom."

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

BENJ. L. McKINLEY,
United States Attorney.

Names of Witnesses Appearing before the Grand Jury.

W. H. Tidwell, J. Wardell, Manuel Joseph, Chas. G. Reay, John McGeough, C. F. May, Fred W. Libby, James Swan, E. E. Enlow, Jas. Head, Capt. John T. Stone.

(Endorsed:) A True Bill. John R. Hanify, Foreman Grand Jury. Presented in open court & Filed Oct. 2nd, 1913. W. B. Maling, Clerk, by Francis Krull, D. C.

21 At a Stated Term of the District Court of the United States of America for the Northern District of California. First Division, Held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable M. T. Dooling, Judge.

#5339.

UNITED STATES
vs.
C. G. REAY et al.

(Minutes, Arraignment, etc.)

Defendants Harry Bradbrook, J. J. Brolan, W. H. Brennan, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher, Joseph McKenna, C. G. Reay, John McGough, Manuel Joseph, each being present in open court, each of said defendants was duly arraigned upon the indictment herein against him, and thereupon the case was continued until October 20, 1913, for plea. On motion of S. C. Wright, Esqr., defendant Tam Tai, who was present, was duly arraigned upon the indictment herein against him, and then and there pleaded not guilty, which said plea was by the court ordered and is hereby entered.

22 At a Stated Term of the District Court of the United States of America for the Northern District of California, First Division, Held at the Court Room Thereof, in the City and County of San Francisco, on Tuesday, the 7th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable M. T. Dooling, Judge.

#5339.

U. S.
vs.
G. B. BALK.

(*Minutes, Arraignment, etc.*)

The defendant herein being present in open court with his attorney S. C. Wright, Esqr., said defendant was duly arraigned upon the indictment herein against him, and case continued until October 20, 1913, for plea.

23 At a Stated Term of the District Court of the United States of America for the Northern District of California, First Division, Held at the Court Room Thereof, in the City and County of San Francisco, on Thursday, the 9th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable M. T. Dooling, Judge.

#5339.

UNITED STATES
vs.
SOO HOO FONG.

(*Arraignment and Plea, etc., of Defendant Soo Hoo Fong.*)

The defendant Soo Hoo Fong herein being present in open court with his attorney Timothy Healy, Esqr., said defendant was duly arraigned upon the indictment herein against him, to which indictment he then and there pleaded not guilty, which said plea was by the court ordered and is hereby entered. Mr. Healy then made a severance of this defendant from the others jointly indicted with him, which said motion was by the court denied.

24 At a Stated Term of the District Court of the United States of America for the Northern District of California, First Division, Held at the Court Room Thereof, in the City and County of San Francisco, on Monday, the 20th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable M. T. Dooling, Judge.

#5339.

UNITED STATES
vs.
HARRY BRADBROOK et al.

(*Minutes, Pleas, etc.*)

Defendants Harry Bradbrook, J. J. Borlan, W. H. Brennan, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher, Joseph McKenna, F. B. Balk, each being present in open court, each of said defendants then and there pleaded not guilty to the indictment herein against them. Cases as to defendants C. G. Reay, John McGough and Manuel Joseph continued for 1 week. Defendant Max Miller also present with his attorney, was then and there duly arraigned upon the indic-ment herein against him, and then and there pleaded not guilty to said indictment. All of said pleas were by the court ordered and are hereby entered.

25 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Bill of Exceptions.

Be it remembered that heretofore the Grand Jury of the United States in and for the Northern District of California, did find and return in, to and before the above entitled court its indictment against the defendants J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, and thereafter the said J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong appeared in said court, and upon being called to plead to said indictment, duly pleaded not guilty, as shown by the record herein, and the cause being at issue, the same came on trial before the Honorable M. T. Dooling, District Judge of the District Court of the United States in and for the Northern District of California, and a jury having been duly empaneled, the United

States being represented by John W. Preston, Esq., and the defendants being represented by Bert Schlesinger, John L. McNab and S. C. Wright, Esquires, the following proceedings were had:

26 MANUEL JOSEPH, called as a witness for the United States, being duly sworn, testified in substance:

That he was in the employ of the United States Government in the customs service; that he was more or less acquainted with all of the defendants and that he knew them under the various names alleged in the indictment to have been assumed by the various defendants, as follows, to-wit: Defendant Brolan assumed the name of "Tom"; defendant Balk assumed the name of "Black"; defendant Vargas assumed the name of "Sam"; defendant Ellison assumed the name of "Smith" and "Baker"; A. J. Taylor assumed the name of "Terry"; John McGough assumed the name of "Harry"; that the witness himself assumed the name of "Mac"; that the defendant Soo Hoo Fong assumed the name of "Gray."

The witness Joseph further testified that the defendant J. J. Brolan and himself on June the 19th, 1910, in the City and County of San Francisco, Northern District of California, removed from the steamer "Siberia" while at pier No. 44, the Pacific Mail Company's dock, sixty cans of opium. After the removal from the vessel the said opium was given to the defendant Joseph McKenna, who was the watchman on pier No. 42. He further testified that it was agreed between them that Brolan, McKenna and the witness should take twenty tins each to a Chinaman by the name of Chun Ki. The witness was then questioned as follows:

"Q. I will ask you if you can relate another circumstance where any of these defendants and yourself were engaged in taking off opium from any vessel?

Mr. SCHLESINGER: Objected to on the ground it is seeking to prove independent acts other than those set out in the indictment, and it is not proof of the conspiracy as declared here; we are here to face an indictment charging a conspiracy commencing
27 on a certain date and terminating at a certain time.

(After argument.)

"The COURT: The objection is overruled."

The objection having been overruled, the witness Joseph testified that on April the 30th, 1912, he took thirty tins of opium off the steamer "Korea", together with defendant J. J. Brolan, who also took thirty tins; that about two years ago, at pier No. 34, twenty tins of opium were taken off the steamer "Korea" by the witness and twenty tins were taken off by the defendant Balk, as Balk admitted to the witness Joseph later.

The witness further testified that on January 14th, 1913, he, together with John McGough, defendants Elias Ellison, Joseph McKenna and A. J. Taylor removed from the steamer "China" about one hundred eighty cans of opium. In connection therewith he further testified that he divided the proceeds derived from the sale of the said opium with McGough, Ellison and McKenna; that on

the 16th day of January, 1913, the witness together with defendant Craigie, A. J. Taylor, Swan and one Marney, took off the steamer "Chiyo Maru" one hundred tins of opium, the proceeds from the sale of which were divided among the above named persons.

He further testified that on February 5th, 1913, he, together with E. E. Vargas, Elias Ellison and C. J. Reay, removed from the steamer "Mongolia" a quantity of opium, but he could not remember the number of tins taken off on that occasion. His share of the proceeds of that transaction was $66, Ellison paying the said sum. That on February 20th, 1913, Tam Fai gave to the witness, Max Miller, E. G. Gallagher, and P. W. Craigie, between fifty and sixty tins of opium removed from the steamer "Tenyo Maro". He further testified that defendant Craigie stated to him that the opium had been delivered to Chun Ki.

28 The witness Joseph further testified that on the 25th day of February, he, the witness, removed from the steamer "Persia", together with defendants E. E. Vargas, Max Miller and John McGough, about one hundred and eighty tins of opium; that there was an understanding between the witness, Vargas and Bradbrook that the opium taken off on this occasion was to be put in Bradbrook's locker and he was to attend to the delivering of it, and that Vargas paid to him his share of the proceeds from this transaction.

He further testified that on the 9th day of January, 1913, the witness, Gallagher, Vargas, McKenna, A. J. Taylor, removed from the steamer "China" one hundred and forty-five tins of opium, and distributed the proceeds of the sale of said opium among the defendants; that he, the witness, received his share.

Joseph further testified that he had had opium transactions with all of the defendants, J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher, and Soo Hoo Fong, and that he, the witness, delivered twenty cans of opium to Soo Hoo Fong and received therefor the sum of $100. That some time in March, 1913, Mr. Ellison called a meeting at his home, at which were present defendants Brolan, Vargas, Max Miller, Balk and A. J. Taylor, at which meeting it was agreed that the sum of Twelve Hundred Twenty-five Dollars be contributed to the case of one John Marney, indicted for smuggling opium, One Thousand Dollars to be used for his bond and Two Hundred Twenty-five Dollars to be used for other expenses in connection with his defense. The witness testified that he paid One Hundred Dollars as his share and Vargas put up the remainder of his share for him and he repaid Vargas; that he saw some of the money handed out in person.

Upon cross-examination, the witness Joseph testified, as
29 in direct, as to a meeting occurring at the house of Ellison, at which the money was contributed, and that the defendants named in direct were present.

He reiterated his testimony as to the taking of opium, together with McKenna and Brolan, from the steamer "Siberia" on the 19th of June, 1910. Sixty cans were removed on that occasion. He also

testified as to having refreshed his memory as to the various dates from the customs house records. He testified in minute details concerning how the opium was removed, and as to the various positions occupied by the defendants implicated in this transaction. He reiterated his testimony as to the transaction alleged to have occurred on the "Korea" on April 12th, 1912. He testified that he had seen Vargas and Bradbrook have in their possession the keys to the lockers in which was stored the opium alleged to have been taken from the various ships; that he had talked many times to defendant Soo Hoo Fong, who assumed the name of "Gray". He reiterated his testimony regarding the alleged transaction taking place on April 30th, 1912, on which occasion opium was removed by him from the steamer "Korea" together with defendant Brolan, going into minute details as to the same; he also went into minute details regarding the removal of opium from the steamer "China" on January 14th, 1913, by himself and defendant Ellison, and the removal of opium from the steamer "Tenyo Maru" by himself, defendant- Craigie and John McGough. Also as to the removal of opium from the steamer "Chiyo Maru" on January 16th, 1913, by himself, defendants Craigie and Bradbrook, together with Swan, Marney and A. J. Taylor. He related in great detail the telephone conversations with defendant Soo Hoo Fong, and went into minute detail as to the alleged transactions with this defendant. He reiterated his testimony to the effect that on February 20th, 1913, fifty or sixty cans of opium were taken from the room of Tan Fai in his presence.

C. J. Reay, called as a witness for the United States, being duly sworn, testified in substance:

That he was in the employ of the United States Government in the customs service; that he knew the defendants Bradbrook, Bolan, Brennan, Balk, Craigie, Ellison, Gallagher, Miller, McKenna, Soo Hoo Fong, A. J. Taylor, Marney, Tam Fai, Vargas, Manuel Joseph, Young Tai and John McGough. He testified that he had had opium transactions with most of the defendants, the first one being the removal from the steamer "China" in 1911 of about ten tins of opium, in which transaction Soo Hoo Fong was implicated, and to Soo Hoo Fong he delivered the opium at his residence at number 854 Clay Street, for which he received compensation. He testified that on numerous other occasions he had transactions in regard to opium with Soo Hoo Fong under the name of Tye On. He testified as to the alleged transaction of removing opium from the steamer "Korea" shortly after the transaction above testified to; that on January 19th, 1913, he, together with Max Miller and John McGough, removed from the steamship "Manchuria" one hundred cans of opium. The opium, after taken from the ship, was given to the defendant McKenna, and was taken away by A. J. Taylor in an automobile. He received one hundred and twenty dollars or one hundred twenty-five dollars for his share of the proceeds of the sale of this opium, and Max Miller, John McGough, A. J. Taylor and defendant McKenna each received one hundred twenty-five

dollars as their share. He further testified that on February 5th, 1913, he, together with defendants E. E. Vargas and Elias Ellison, and Manuel Joseph, removed from the steamer "Mongolia" about one hundred tins of opium; that all of the defendants were
31 implicated in the alleged transaction, or had knowledge of it; that the proceeds of the sale of the said opium was divided among the above-named defendants and each received as his share Sixty-six dollars; that on February 22nd, 1913, E. E. Vargas, Max Miller, Elias Ellison and the witness removed from one of the ships eighty tins of opium; that the witness gave his opium to Young Tai and the other defendants gave theirs to another Chinaman, name unknown. There was no agreement as to how the proceeds from this transaction were to be divided. The witness further testified that on April 4th, 1913, he, together with defendant Balk, took off the steamer "Manchura" a quantity of opium, the witness taking twenty tins and defendant Balk taking twenty tins; the witness gave his opium to Soo Hoo Fong, having made arrangements over the telephone with him. Soo Hoo Fong's telephone number is China 652. Balk also disposed of his opium to Soo Hoo Fong. He further stated that on May 11, 1913, the witness and Max Miller removed a quantity of opium from the steamer "Tenyo Maru". This opium was also delivered to Soo Hoo Fong; that on May 7th, 1913, he, in company with Ellison and McGough, removed from the steamer "Tenyo Maru" forty tins of opium and that about July 20th he and defendant Craigie removed from the "Tenyo Maru" one hundred tins of opium; that on August 17th, 1913, the witness and defendant Bradbrook removed from the steamship "Siberia" one hundred tins of opium. Bradbrook put this opium in his locker and later delivered it to Soo Hoo Fong, the witness stating his share of the proceeds of this transaction being three hundred dollars; that on February 9th, 1913, he and defendant Gallagher removed from the steamer "Mongolia" twenty tins each of opium, for which they were paid Five Dollars a tin; that on another night shortly afterwards the witness and defendants Gallagher and Miller removed
32 from the same steamer sixty tins of opium, which was divided between defendants Gallagher and Miller and the witness. This opium was delivered to Soo Hoo Fong. The witness stated that he had never had any opium transactions with defendant Brennan. He further testified that on July 20th, 1913, he, in company with defendants Craigie and Vargas and one Collins and Roth, removed from the "Tenyo Maru" a quantity of opium, of which the witness received sixty tins of opium as his share. He further stated that on January 17th, 1913, he, with McGough and defendant Vargas, removed from the steamer "Manchuria" twenty tins each of opium. Soo Hoo Fong bought this opium. The witness stated that he sold all of his opium to Soo Hoo Fong or to Young Tai. He also stated that he was told of a meeting at Ellison's house at which a sum of money was raised for the bond and defense of one Marney, and that he was urged by defendants Balk, Ellison and Gallagher on numerous occasions to put up money, but he refused to contribute anything to the defense, and was called by the defend-

ants a "cheap guy". He was told that Marney would keep his mouth shut if he was defended and bail put up; that they were afraid he might tell on them. Gallagher and Ellison made this statement to the witness. The witness further testified that in all of these transactions his name was "Johnson". The names assumed by these defendants during the times that these alleged transactions were said to have occurred, were: Miller's assumed name was "Leo"; that of Ellison "Smith"; Vargas was known as "Sam", Gallagher as "Dick", Balk as "Black", Soo Hoo Fong as "Tye On" and "Dr. Gleeson"; Young Tai was known as "Sam", McKenna as "the old man"; Joseph was known as "Mac", and McGough as "Harry."

33 J. G. MATTAS, JR., called as a witness for the defendant E. E. Vargas, being first duly sworn, testified that he had known the defendant for fifteen or twenty years, and in answer to the question as to the defendant's general reputation in this community where he resides, as to the qualities of truth, honesty and integrity, the witness stated that the defendant's reputation was good and that he had never heard anything said against defendant Vargas. On cross examination, the witness testified that although he was Appraiser of the port of San Francisco, he never had any relations at all with the customs inspectors or guards, and had no business connections with the defendant Vargas as such; that he did not know his reputation or standing among the customs officials.

JOHN MCGOUGH, called as a witness for the United States, being first duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service; that he was first employed as a laborer and then was promoted to the position of customs guard; that he knew the defendants J. J. Brolan, W. H. Brennan, Harry Bradbrook, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, and Joseph McKenna, but that he did not know A. J. Taylor, Tam Fai, Young Tai or Soo Hoo Fong; that he did not know whether Brolan or Brennan had assumed names; that Balk's assumed name was "Black", Ellison's "Smith", Miller's "Leo"; that the defendant Craigie had a fictitious name, but that he could not remember it; that he did not know defendant Gallagher's fictitious name; that he did not know anything about McKenna having a fictitious name, and that he never knew A. J. Taylor at any time.

34 The witness further testified that on January 16th, 1913, he, together with Manuel Joseph and defendant Craigie were assigned to watch the vessel "Chiyo Maru"; that he saw Joseph and Craigie removing opium from the ship and that he shouted down to them and asked them what they were about; that Joseph replied "You butt in and spoil things", or words to that effect. That he got $90 as his share of the proceeds of this transaction. He further testified that on February 25th, 1913, he, together with Joseph and Vargas, removed a quantity of opium from the steamer "Persia"; that when he asked Vargas for his share of the proceeds on this al-

leged transaction, Vargas replied "You go to hell", and that he received nothing. He further testified that on February 26th, 1913, the "Persia" was living at pier number 44 and that he, the witness, with Miller and Ellison, was on pier 42; that they removed a quantity of opium from the vessel and that he, the witness, took the opium out to Miller's house and left it there; Miller's home was situated between Hyde and Fillmore Streets, on Broadway. There were forty tins of the opium, and the witness' share of the proceeds of this transaction was $80. He further stated that on January 19th, 1913, he, Reay and Miller removed one hundred tins of opium from the "Manchuria"; that McKenna was the watchman on the wharf and that he took it away on a truck. He stated that Reay gave him $90 as his share of the proceeds of the sale of this opium; he further stated that he did not subscribe any money toward any bond for any one; that Miller spoke to him, saying that he should give something towards Marney's bond; that Ellison also asked him, but that he replied that he did not see why he should give anything; that he never subscribed; that defendants Vargas and Balk also asked him to subscribe.

35 ALEXANDER J. TAYLOR, being called as a witness for the United States, being first duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service. After having testified as to his name, Mr. McNab of counsel for defense, asked leave to ask preliminary questions for the purpose of objecting to the witness' testimony, citing the case of Thompson v. United States, 202 Federal, which the court granted, and the following occurred:

Mr. MCNAB:

Q. What is your full name?
A. Alexander J. Taylor.
Q. Have you recently been convicted of a felony in the southern district of California?
A. Yes, sir.
Q. And sentenced to what prison?
A. San Quentin.
Q. For what period of time?
A. Two years, sir.
Q. Have you ever been pardoned?
A. No, sir.
Q. Are you now an inmate of the States prison?
A. Yes, sir.

Mr. MCNAB: If your Honor please, I desire to move the exclusion of the testimony of the witness and object to his testifying upon the ground that he is an incompetent witness to testify, he having been convicted of a felony, imprisoned in a federal penitentiary, which is a state penitentiary, and that he has never been pardoned.

Mr. PRESTON: I always understood the law to be that that went to his credibility and not to his competency.

36 The COURT: The objection is overruled.
Mr. SCHLESINGER: We take an exception.

The objection having been overruled, and exception taken, the witness testified as follows: That he knew defendants Ellison, Max Miller, Vargas, McKenna, Harry Bradbrook, but that he did not know defendant Balk; that all of the defendants he knew he knew under their true names; that he knew Manuel Joseph; that he was called over the telephone to Mr. Ellison's home in the year 1913; that when he went to the house he found Joseph, Ellison, Vargas, Miller and two other persons present. At this meeting bail was raised for one Marney, and money to obtain a lawyer for him. That the witness was asked to go on bail for Marney and contribute towards the fee of the lawyer. Attorney Edwin Myers was engaged. $500 was collected on two occasions for the purpose of bail and between $220 and $240 for the lawyer's fee. The witness further testified as to a misunderstanding as to the amount of bail required, among the rest of the defendants present at this meeting; the various defendants were under the impression that only $500 cash was required; a couple of hours intervened between the getting of the first $500 and the second $500; the money collected was paid to Myers and he was told to make the arrangements. The witness further testified that he had been convicted of smuggling opium across the border into the southern district of California.

LEONG DUCK, being called as a witness for the United States, being first duly sworn, testified in substance:

That he was an American-born Chinaman, twenty-nine years old; that he knew the defendant Miller under the name of "Leo", and had been at his residence, No. 1167 Broadway, in the City
37 and County of San Francisco, State of California, about seven or eight times; that he was there on July 2nd, 1913, the day upon which the witness was arrested, having been arrested about a block and a half from Miller's home by Mr. Stone, who took a package off of the witness which he had gotten from Mr. Miller, for which he paid him $120. He further testified that he had obtained many other similar packages from Miller. No cross-examination by the defense was had. Leong Duck, being recalled as a witness for the United States, testified in substance as follows: Upon being asked by the District Attorney, he stated that he was not positive whether or not he had seen the defendant Brennan. On being recalled for further cross-examination he stated that he did not remember having said on the previous day positively that he did not know Brennan. The witness testified that he knew Parker Maddox and Joseph, and Inspector Head, also Deputy Surveyor C. A. Stephens, and that he was in the office of Maddox & Devlin in the Mills Building in July, 1913. He further stated that he never told the above named persons that he gave ten tins of opium to Brennan, the customs inspector, at the bridge at the corner of Twenty-fourth and Folsom Streets, but stated that he had used the name "Nicholas" in referring to Brennan,—that he knew Brennan under the name of "Nicholas". He further testified that he knew defendant Balk

under the name of "Black"; that he had many transactions with Balk, at the park at the corner of Scott and McAllister Streets, in which he paid him money. After being asked as to each defendant specifically, witness testified that he did not know the defendants under any assumed, or any other name. He further stated that on July 3rd, 1913, in the presence of Miller and Captain Stephens, he stated: "I do not know Miller", although as a matter of fact he did know him at the time, and that he never testified as to having known Miller, or having been promised immunity by the District Attorney.

38 RICHARD C. RUSH, called as a witness for the defendants, being first duly sworn, testfied in substance as follows:

That he was in the government service, and had been about eight or nine years in the customs service; that he had been eleven years a soldier and six years in the transport service; that he knew the defendant Mr. Elias Ellison, since the defendant Ellison had been in the service; that said defendant Ellison had been on night duty, although he had made numerous applications for day duty, stating that the night service was making him ill. The witness further testified that defendant Ellison acted peculiarly periodically, for a few days during each month; that the customs guards were accustomed to use such expressions concerning Ellison as: "Something wrong with him today", and "Leave him alone" it being the common talk among the men. On cross-examination the witness stated that on two or three occasions it has been necessary to relieve the defendant Ellison from duty.

CHARLES A. STEPHENS, called as a witness for the defendants, being first duly sworn, testified in substance as follows:

That he had been in the customs service for twenty years and that in July, 1913, he had occupied the position of Deputy Surveyor at the port of San Francisco; that he knew the Chinaman Leong Duck, and had seen him in July, 1913, in the presence of Joseph Head and Parker Maddox; that Leong Duck at that time stated to him that he had received ten tins of opium from Brennan upon one occasion at Twenty-third and Townsend Streets; he described Brennan to him, and afterwards picked him out, and stated that he knew the defendant Brennan by aliases. On cross-examination the witness further testified where he met the defendant Brennan, who had assumed the name of "Nicholas".

39 On re-direct examination this witness testified that on or about July 3rd, 1913, the defendant Miller was called into his presence, together with Leong Duck; that both Leong Duck and the defendant Miller denied knowing one another, and Leong Duck said on that occasion that he did not know Miller. Later Leong Duck admitted to the witness that he knew defendant Brennan as "Nicholas", and identified him as such.

JOSEPH HEAD, called as a witness for the United States, being first duly sworn, testified in substance as follows:

That he had been in the customs service for eighteen years, and was at the present time inspector of the customs, having charge of the searching and guarding of steamers; that in July, 1913, he made a search in the home of Max Miller, at 1167 Broadway, in the City and County of San Francisco, Northern District of California; the following then occurred:

Q. Tell us what you found in connection with money at that time.

Mr. SCHLESINGER: We object to that as being immaterial, incompetent and irrelevant, not binding upon these defendant- and relating to a matter long subsequent to the matters concerned here, and that it is purely he-resay and a matter without the presence of the defendants.

The COURT: Objection overruled.

Mr. SCHLESINGER: Exception.

A. I found $2000 in a leather purse in Mr. Miller's flat in the third room from the front door, in a bureau.

Mr. SCHLESINGER: I will state the rule and your Honor will read the authority. In the case of United States v. Williams, there was a Chinese inspector charged with extortion. The amount of his salary was shown at the trial, I think some small amount, $125 a month. The Government proved over the objection of the defendant, that there was found to his credit in the Hibernia Bank, and I believe also in the German Bank sums aggregating about $17,000, and for the admission of that evidence the case was reversed.

The COURT: The objection is overruled.

Mr. SCHLESINGER: Your Honor, the objection is——

The COURT: You have made your objection.

Mr. SCHLESINGER: No. I did not cover it, your Honor. I simply read the authority. I wish to make the objection on the ground that it is absolutely irrelevant, incompetent and immaterial, not binding upon any of the defendants, and incompetent for the reasons stated.

The COURT: The objection is overruled.

Mr. SCHLESINGER: Exception.

Mr. PRESTON: How was this money wrapped?

Mr. SCHLESINGER: Same objection to this line of evidence already stated, and for the reasons set forth in the Williams case.

The COURT: Same ruling.

Mr. SCHLESINGER: Exception.

A. It was in a leather purse, and the purse wrapped in a newspaper, a part of the San Francisco "Examiner" of July 2nd, 1913, the search having been made on July 3rd, 1913.

Q. I ask you whether or not on that occasion you found this card.

A. Yes, I found it in the bureau containing the $2,000, but I do not know whether the two packages were together or not.

Mr. SCHLESINGER: We object upon the ground that that
41 comes within the rule against unlawful seizure of a man's private documents, the witness having testified to having taken it out of Miller's room."

The court having given Mr. Schlesinger permission to examine the witness as to the nature of the seizure, the following occurred:

Mr. SCHLESINGER:

Q. Captain, did Mr. Miller give you permission to take that card from his house?

A. No, sir.

Q. Did you have a search warrant?

A. Yes, sir.

Q. Will you produce it? * * *

Mr. SCHLESINGER: Now, if your Honor please, having read this search warrant, we renew the objection and ask that the search warrant be admitted in evidence as a part of the objection.

Q. Did you have any other search warrant besides this?

A. No, sir.

Q. Did you have any search warrant authorizing you to search for letters, papers, memoranda or private documents?

A. No, sir.

Mr. PRESTON:

Q. Just read the numbers contained on that card?

Mr. SCHLESINGER: Your Honor, may it be understood before they are finally read that it goes in under the objections we have just enumerated, and that objection goes to the benefit of all of the defendants?

The COURT: Surely.

Mr. SCHLESINGER: And also in addition to that we make the objection that it is not binding on any of the defendants
42 represented by Mr. McNab, Mr. Fallon and myself, and take an exception."

"A. The first number is C 5003, which is the Home number of a Chinese at 742½ Washington Street, known as Chung Kai. The second number is P. 1842, which is the telephone number of Charles Reay, a customs guard. The third is 5154, which is Home Telephone number of a society of which Leong Duck is a member; P 105 is Pekin 105, Wong Bat Mon; the fifth is C 6735, Home Telephone number of Soo Hoo Fong, 854 Clay Street; the sixth, C 1217 Pacific States Telephone number of Chung Kai at 742½ Washington Street, San Francisco."

The witness further testified as to having made a search of the rooms of the house of Soo Hoo Fong on several occasions during the year 1913.

"Q. I will ask you if upon any of those occasions in the year 1913 you found any opium in his house?

Mr. SCHLESINGER: Objected to as irrelevant, immaterial and in no wise binding upon the defendants.

The COURT: Objection overruled.

Mr. SCHLESINGER: Exception."

Over the objection and exception of the defense witness testified as to having found opium on the second floor of Soo Hoo Fong's residence, which was being occupied as a rooming house for Chinese; that he also found what he called "opium stains" in Soo Hoo Fong's bedroom in the inside of a suitcase.

"Q. What kind of stains were they? What size?

Mr. SCHLESINGER: We object to that as incompetent, irrelevent and immaterial and not binding upon the defendants.

The COURT: Objection overruled.

Mr. SCHLESINGER: Exception."

43 The witness then testified that the stains were large enough to be scraped with a knife blade and on being burned gave out the smell of opium. That opium was found on the second floor in the front room facing the street, in a half a dozen places. No one was occupying the room at the time it was found. Soo Hoo Fong was the proprietor of the boarding house at that time.

The witness testified that about thirty-eight or forty tins of opium were taken from Soo Hoo Fong's boarding house at that time, the rest of the opium being in skins or bladders. He further stated that he recalled the arrest of Charles May, together with one Libby, in a boat. The boat was coming from under the Pacific Mail wharf alongside of which the steamer "Korea" was berthed, and that Ellison was on duty at that time on the gangway of the "Korea", and that it was about a thousand feet from the "Korea" to the boat in which May was rowing when the witness first saw him. That there were no other foreign vessels in port at that time. The witness testified to having seen a barge and that Inspector Enlow was with him when he saw May in this boat. Otto Lenfer was with May in the boat at the time of his arrest. The witness arrested them that night and later recovered the opium which they threw overboard from the boat at the time of the arrest. That one hundred — eighty tins were recovered.

"Mr. SCHLESINGER: Now, if Your Honor please, we move to strike out all of that testimony of this witness upon the grounds enumerated in our objection. With respect to this question, your Honor, may it be understood that that objection was made timely?

The COURT: You mean as to seizure?

Mr. SCHLESINGER: Yes, sir.

The COURT: That will be understood. There will be no difficulty about that. If the court has erred you surely will
44 have whatever benefit you can derive from that."

On cross-examination the witness testified that John Smith, Toland and Enlow were with him when he searched the house of Soo Hoo Fong, and that the house which he testified to as being the home of Mr. Soo Hoo Fong was not a private residence, but a

four-story building, with a saloon and a general merchandise store on the street, a rooming house on the second floor, a rooming house on the third floor, and Mr. Soo Hoo Fong's rooms on the fourth floor, and that according to this description the opium was found on the third floor, and not on the floor on which Soo Hoo Fong lived. He further testified that he asked Soo Hoo Fong for every key that he had in his possession, and that he went down into the room where the opium was found and tried to open the door with Soo Hoo Fong's keys, but could not find a key to fit, and that it was finally necessary to smash the door in to get in; that Mr. Soo Hoo Fong was not occupying that room, and the room seemed to be in the nature of a vacant room, with a bed and a bureau in it, and the usual furniture found in a rooming house, and when the witness testified as to having found the opium at what was called Mr. Soo Hoo Fong's place he alluded to the opium found on the third floor of this four-story building, part of which was occupied as a rooming house and known by the number "854" "Clay Street." There were twenty-five rooms on the second and twenty-five rooms on the third, and on the fourth Mr. Soo Hoo Fong and his family resides. He further testified that he took with him every scrap of correspondence and writing that he could find on the place; that he searched Soo Hoo Fong's rooms about three times and found an ordinary, plain traveling suitcase, empty; the largest of the stains found in the suitcase would cover as large an area as a 25¢ piece; that the stain was dry; that the age of the stain was unknown to the witness, but enough of it was taken on the point of a knife blade to be able to be burned with a match; he made a thorough and most complete search of Mr. Soo Hoo Fong's rooms, and all the opium that he found was a stain about the size of a 25¢ piece, age unknown. On cross-examination by Mr. Black, the witness testified that the money which he had testified to on direct examination as having been found in Mr. Miller's house, was found in a room occupied by a man of the name of Hammel, who said it was his money. He claimed the money found in the bureau as his. The witness further testified that he did not know the handwriting on the card which he had found in Miller's home, and that he later ascertained that Hammel was an employ- of the Pacific States Telephone Company, and worked there for approximately a year as an inspector of lines. The witness refused to say under oath that the numbers found on this card were any numbers inspected by Mr. Hammel as an inspector for the telephone company. He further testified that Mr. Miller was not home at the time of the search, and that Mrs. Miller stated that she would leave the house if he were to search it, and left him in possession of the place, after the witness had stated to her that he came with a search warrant to search the house. On direct examination by Mr. Schlesinger, the witness further stated that he knew the defendant Ellison since the defendant had been in the customs service, and that the defendant Ellison frequently requested him for a transfer from night service to day service, upon the grounds of illness. On being questioned by Mr. Fallan, the witness testified that he had never found any opium in the room of Tam Fai, on

any of the boats. On re-direct examination, the witness testified that he had never found any opium in the rooms of Tam Fai, although numerous searches for it had been made, and although the room was occupied by Tam Fai, he had seen any num-
46 ber of Chinamen in there at various times.

CHARLES HUGHES, called as a witness for the United States, being first duly sworn, testified in substance as follows:

That the Illinois Surety Company, of which he was manager, put up $1,000 cash bond for one Marney, and that the same was negotiated by Edwin H. Meyer.

EDWIN H. MEYER, called as a witness for the United States, being first duly sworn, said that as to the conversations between the witness and Taylor as to the raising of the Marney bond, he claimed that any conversations appertaining thereto were privileged conversations, and the court dismissed the witness.

CHARLES MAY, called as a witness for the United States, being first duly sworn, testified in substance as follows:

That he was arrested June 20, 1912, for smuggling opium. That he knew the defendant Ellison, having become acquainted with him at 5:00 o'clock in the daytime of July 20, 1912.

The following named persons testified that the reputation of the defendants Harry Bradbrook, J. J. Brolan, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Joseph McKenna, for truth, honesty and integrity in the community in which they reside, was good: J. G. Mattas, Al. T. Bixley, Fred Engel, J. G. Talt, J. H. Smith, Ben Appel, John T. Gilmartin, F. G. Wisher, F. T. Levy, O. Walker, Dr. A. T. Guttner, J. Puffer, William Sea, Jr., J. Keegan J. W. Really, P. E. Slavin, J. Welch, C. H. Blenn, John J. Cullen, W. Burke, A. Zeeder, C. L. Brown, E. H. Montell, J. Looney and H. N. Roach.

The following named persons testified that the reputa-
47 tion of Soo Hoo Fong for truth, honesty and integrity in the community in which he resides, is good: H. L. Tisdale, E. W. Joy, A. G. Pankhurst, T. Schmidt, J. B. Wendt, J. B. Stope, J. G. Chown, V. G. Vechi, C. K. McIntosh and J. C. Ouglin.

J. J. BROLAN, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service, at the time of his arrest; the he knew all of the defendants. He denied that he and defendant Manuel Joseph on June 19th, 1910, at the City and County of San Francisco, Northern District of California, removed from the Steamship "Siberia" while at pier number 44, Pacific mail Company's dock, about sixty cans of opium, and further denied that after the removal of the said opium it was given to Joseph McKenna, the watchman

at pier 42, and further denied that it was ever agreed between them that he, Joseph McKenna and Manuel Joseph should take twenty tins each to a Chinaman by the name of Chung Kai. The witness further denied that in furtherance of any conspiracy, combination, confederation or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, he assumed the name of "Tom". The witness further denied that he, together with defendant Manuel Joseph, on April 30th, 1912, took thirty tins of opium off the steamship "Korea", and denied that he ever had any opium transactions with the defendant Joseph. He further stated that he never, contrary to law, smuggled opium of any kind, character or nature into San Francisco or into any other place in the United States from any foreign port; that he never wickedly, unlawfully or feloniously conspired, confederated, combined and agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law to receive, conceal, faciliate the transpor-
48 tation and concealment after importation of opium of any kind, character or nature whatsoever into the United States from any foreign port or place; that he never contributed anything to the expenses of defending or the provision of bail for one John Marney, indicted for smuggling opium.

P. W. CRAIGIE, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service at the time of his arrest; he denied that, in furtherance of any conspiracy, confederation, combination or agreement to feloniously receive, conceal and facilitate the transportation and concealment after importation of certain opium into the United States from some foreign port, contrary to law, he, together with defendants Tam Fai and E. E. Vargas, on the 12th day of December, 1912, at the City and County of San Francisco, Northern District of California, removed from the steamship "Tenyo Maru" about sixty cans of opium; he also denied that he, together with Manuel Joseph, A. J. Taylor and a Chinese interpreter, on the 9th day of February, 1913, at the City and County of San Francisco, Northern District of California, removed from the steamship "Shinyo Maru" about one hundred eighty tins of opium; he further denied that he, together with Manuel Joseph and defendants Max Miller, E. J. Gallagher and Tam Fai on the 20th day of February, 1913, at the City and County of San Francisco, Northern District of California, removed from the steamship "Tenyo Maru" about sixty cans of opium, and denied that he stated to the witness Joseph that the opium removed from the "Tenyo" had been delivered to Chung Kai. He denied that he ever had any opium transactions of any kind, character or nature whatsoever with the witness Joseph; he denied that he ever contributed anything to the expenses of defend-
49 ing or the provision of bail for one John Marney, indicted for smuggling opium; he further denied that on the 16th day of January, 1913, he, together with the witness Manuel Joseph,

A. J. Taylor, John McGough, one Swan and one Marney, took off the steamer "Chiyo Maru" one hundred tins of opium, the proceeds from the sale of which were divided among the above-named persons; the witness further denied that in furtherance of any conspiracy, combination, confederation or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, he assumed any fictitious name whatsoever; he further stated that he never, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco or into any other place in the United States from any foreign port or place; that he never wickedly, unlawfully or feloniously conspired, confederated, combined and agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law to receive, conceal, facilitate the transportation and concealment after importation of opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

G. B. BALK, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service at the time of his arrest; he denied that on the 15th day of February, 1913, in the City and County of San Francisco, Northern District of California, he removed from the steamship "Tenyo Maru" twenty tins of opium; he further denied that, together with C. J. Reay, on the 14th day of April, 1913, at the City and County of San Francisco, Northern District of California, he removed from the steamer "Manchuria" forty tins of
50 opium; he further denied that on the 20th day of June, 1913, at the City and County of San Francisco, Northern District of California, he, together with Manuel Joseph, A. J. Taylor and defendants Elias Ellison, Max Miller, E. E. Vargas and E. J. Gallagher contributed the sum of Twelve Hundred Twenty-five Dollars to the case of John Marney, for the defense and the provision of bail for the said Marney, indicted for smuggling opium. He further denied that in furtherance of any conspiracy, combination, confederation or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, he assumed the name of "Black" or any other fictitious name whatsoever; he also denied that he ever, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco or into any other place in the United States from any foreign port or place; that he never wickedly, unlawfully or feloniously conspired, confederated, combined and agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law to receive, conceal, facilitate the transportation and concealment after importation of opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

E. E. VARGAS, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service at the time of his arrest; he denied that on the 12th day of December, 1912, he, together with defendants Craigie and Tam Fai, at the City and County of San Francisco, Northern District of California, removed from the steamer "Tenyo Maru" sixty cans of opium; he denied that on the 5th day of February, 1913, he, together with Manuel Joseph, Charles Reay and defend-
51 ant Ellison, at the City and County of San Francisco, Northern District of California, removed from the steamship "Mongolia" a quantity of opium, the exact amount of which to the Grand Jury was unknown, and also denied that he paid Joseph Sixty-six Dollars as the proceeds of said transaction; he further denied that on the 25th day of February, 1913, he, together with Manuel Joseph, John McGough and defendants Max Miller and Harry Bradbrook, at the City and County of San Francisco, Northern District of California, removed from the steamship "Persia" two hundred thirty cans of opium; he also denied that on the 26th day of June, 1913, he, together with Charles Reay and defendants Max Miller and Elias Ellison, at the City and County of San Francisco, Northern District of California, removed from the steamer "Manchuria" two hundred and ten cans of opium; he also denied that on the 20th day of June, 1913, he, together with A. J. Taylor, Manuel Joseph, and defendants Elias Ellison, Max Miller, G. B. Balk and E. J. Gallagher, contributed Twelve Hundred and Twenty-five Dollars for the defense of and provision of bail for one John Marney, indicted for smuggling opium, and denied that he put up a portion of Joseph's share of this contribution, for which Joseph repaid him later; he denied that on the 9th day of January, 1913, he, together with A. J. Taylor and defendants McKenna and Gallagher, at the City and County of San Francisco, Northern District of California, removed from the steamer "China" one hundred forty-five tins of opium; he further denied that on the 22nd day of February, 1913, he, together with defendants Max Miller and Elias Ellison, at the City and County of San Francisco, Northern District of California, removed from one of the ships eighty tins of opium; he further denied that on the 20th day of July, 1913, he, together with C. J. Reay, one Collins and one Roth, at the City and County of San Francisco, Northern District of California, removed from the steamer "Tenyo Maru" about three hundred tins of opium; he further denied
52 that on the 17th day of January, 1913, at the City and County of San Francisco, Northern District of California, he, together with John McGough, and C. J. Reay, removed from the steamer "Manchuria" sixty tins of opium, and that Soo Hoo Fong bought this opium. He further testified that he never asked C. J. Reay, or any one else, to subscribe to the fund raised for the defense and bail of John Marney, indicted for smuggling opium. He further denied that in furtherance of any conspiracy, combination, confederation or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain

opium, he assumed the name of "Sam," or any other fictitious — whatsoever; he also denied that he ever, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco or into any other place in the United States from any foreign port or place; that he never wickedly, unlawfully or feloniously conspired, confederated, combined and agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law, to receive, conceal, facilitate the transportation and concealment after importation of any opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

E. J. GALLAGHER, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service at the time of his arrest; he denied that on the 9th day of February, 1913, he, together with C. J. Reay, at the City and County of San Francisco, Northern District of California, removed from the steamer "Mongolia" about twenty cans of opium; he further denied that on the 20th day of February, 1913, he, together with defendants Max Miller, P. W. Craigie, Tam Fai and Manuel Joseph, at the City and County of San Francisco, Northern
53 District of California, removed from the steamer "Tenyo Maru" sixty cans of opium; he further denied that on the 9th day of January, 1913, he, together with A. J. Taylor and defendants McKenna and Vargas, at the City and County of San Francisco, Northern District of California, removed from the steamer "China" one hundred forty-five tins of opium; he further testified that he never, in furtherance of any conspiracy, combination, confederation or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, assumed the name of "Dick," or any other fictitious name whatsoever. He also denied that on the 20th day of June, 1913, he, together with A. J. Taylor, Manuel Joseph, and defendants Elias Ellison, Max Miller, G. B. Balk and E. E. Vargas, contributed Twelve Hundred and Twenty-five Dollars for legal services and provision of bail for one John Marney, indicted for smuggling opium; he also denied that he ever, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco, or into any other place in the United States, from any foreign port or place; that he never wickedly, unlawfully or feloniously conspired, confederated, combined or agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law, to receive, conceal, facilitate the transportation and concealment after importation of any opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

ELIAS ELLISON, called as a witness for the defendants, being duly sworn, testified in substance:

That he was in the employ of the United States Government, in the customs service at the time of his arrest; he denied that on the 14th day of January, 1913, he, together with Manuel
54 Joseph, John McGough and defendant McKenna, at the City and County of San Francisco, Northern District of California, removed from the Steamship "China" about one hundred eighty cans of opium, and denied that he divided the proceeds from the sale thereof. He further denied that on the 5th day of February, he, together with Manuel Joseph, C. J. Reay and defendant Vargas, at the City and County of San Francisco, Northern District of California, removed from the steamship "Mongolia" a quantity of opium, the exact amount of which was to the Grand Jury unknown, and denied that he paid Sixty-six Dollars to Manuel Joseph as the proceeds of this transaction. He further denied that on the 25th day of March, 1913, he, together with John McGough and defendant Max Miller, at the City and County of San Francisco, State of California, removed from the steamer "Siberia" a quantity of opium the exact amount of which was to the Grand Jury unknown; he further denied that he called a meeting at his home, at which were present defendants Brolan, Miller, Vargas, Balk and A. J. Taylor, at which meeting Twelve hundred and Twenty-five dollars were contributed for the defense and provision of bail for one John Marney, indicted for smuggling opium. He further denied that on the 7th day of May, 1913, he delivered to Soo Hoo Fong, together with C. J. Reay and John McGough, about forty tins of opium taken from the steamer "Tenyo Maru." He further testified that he never, in furtherance of any conspiracy, confederation, combination or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, assumed the name of "Smith," or any other fictitious name whatsoever. He also denied that he ever, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco, or into any other place in the United States, from any foreign port or place; he also testified that he never wickedly, un-
55 lawfully or feloniously conspired, confederated, combined or agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law, to receive, conceal, facilitate the transportation and concealment after importation of any opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

SOO HOO FONG, called as a witness for the defendants, being duly sworn, testified in substance:

That he was a merchant by occupation, and that he had kept a merchandise store in San Francisco for a period of approximately twenty years; he denied that on the 25th day of March, 1913, he, together with C. J. Reay, at the City and County of San Francisco, Northern District of California, removed from the steamer "Siberia"

ten tins of opium; he further denied that on the 17th day of August, 1913, he, together with C. J. Reay and defendant Bradbrook removed from the steamship "Siberia", at the City and County of San Francisco, Northern District of California, one hundred cans of opium; he also denied that he ever received twenty cans of opium from Manuel Joseph, for which One Hundred and Twenty dollars was paid; he further denied that he ever received ten tins of opium from C. J. Reay, or that he ever had numerous, or any, transactions with Reay regarding opium, under name of "Tye On"; he further denied that on the 7th day of May, 1913, he received from C. J. Reay, defendants Ellison and John McGough, at the City and County of San Francisco, Northern District of California, about forty tins of opium taken from the steamer "Tenyo Maru"; he further denied that on the 17th day of August, 1913, at the City and County of San Francisco, Northern District of California, he received one hundred, or any number of tins of opium from defendant
56 Bradbrook; he further testified that he never, in furtherance of any conspiracy, confederation, combination or agreement to unlawfully receive, conceal, facilitate the transportation and concealment after importation of certain opium, assumed the names of "Gray" or "Dr. Gleeson", or any fictitious name whatsoever; He also denied that he ever, contrary to law, smuggled opium of any kind, character or nature whatsoever into San Francisco, or into any other place in the United States, from any foreign port or place; he also testified that he never wickedly, unlawfully or feloniously conspired, confederated, combined or agreed with the other defendants mentioned in this indictment, or with any other person or persons, contrary to law, to receive, conceal, facilitate the transportation and concealment after importation of any opium of any kind, character or nature whatsoever into the United States from any foreign port or place.

The foregoing contains all of the testimony and evidence both oral and documentary, and a full statement of the proceedings in the case, affecting the matter to which the exceptions relate. At the close of the taking of the testimony, the court charged the jury as follows, and the following are all of the instructions given by the court to the jury:

As to the defendant W. H. Brennan, you are directed to return a verdict of not guilty; upon the plea of once in jeopardy, interposed by the defendant Max Miller, you are directed to find for the Government, and as to all of the defendants you are directed to return a verdict of not guilty upon the first count of the indictment.

The defendants are charged, in the 2nd count of the indictment, with violating section 37 of the Criminal Code of the United States, which provides: "If two or more persons conspire to com-
57 mit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as therein provided". The offense which the defendants are charged with having conspired to commit is that of receiving, concealing, and

facilitating the transportation and concealment of certain opium after importation, such opium being opium heretofore imported into the United States contrary to law, as the defendants well knew.

You will observe that this section requires, before the offense is complete, first, the conspiracy to commit an offense against the United States, and second, that one or more of the parties to such conspiracy shall do some act to effect the object thereof. This act is known in law as an "overt act". It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of them be proved, and that it was done to effect the object of the conspiracy. To this indictment the defendants have entered a plea of not guilty, thus putting in issue all the material facts embraced therein.

It is the duty of the court to state to you such principles of law as are applicable to the issues to be submitted to you,—and first, you will observe that the indictment herein gives rise to no presumption against the defendants whatever. Such indictment is not evidence or proof in any sense, and must not be considered or treated as such, or acted upon by you as evidence or proof against the defendants.

The defendants and each of them are presumed to be innocent and this presumption has the weight and the effect of evidence in their behalf, and it continues to operate in their favor until it is overcome by competent evidence; and, if the evidence introduced in this case does not overcome this presumption of innocence
58 to your satisfaction, to a moral certainty and beyond all reasonable doubt, you must find the defendants not guilty.

It is not necessary for the defendants to prove their innocence, but the burden rests upon the prosecution to establish every element of the crime with which the defendants are charged, and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one element of the crime with which the defendants are charged, and which it is necessary to establish, in order to convict, or, if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any element constituting the crime to a moral certainty and beyond all reasonable doubt, then you must find the defendants not guilty.

The defendants can only be convicted, if at all, of the precise crime set out in the indictment, and although you may be satisfied from the evidence that the defendants have been guilty of other crimes or offenses, nevertheless, they cannot be convicted of the crime set out in the indictment unless the evidence proves to you their guilt of that particular crime, and unless you find, beyond a reasonable doubt that a conspiracy existed among one or more of the defendants as alleged in the indictment, you must find all of the defendants not guilty. Mere knowledge of the existence of such conspiracy without active participation therein is not sufficient to warrant the conviction of any defendant. Participation without knowledge, or knowledge without participation is not sufficient to warrant a conviction.

You are the exclusive judges of the weight of evidence here, and the credibility of the witnesses. Under your oaths as jurors you are to take into consideration only such evidence as has been
59 admitted by the Court, and you should in obedience to your oaths, disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to, and to which objections were sustained. The defendants are to be tried only on the evidence which is before you, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted. And I caution you to distinguish carefully between the testimony offered here by the witnesses on the stand and statements made by counsel, or maintained in their argument, as to what facts have been proved; and if there is a variance between the two, you must, when arriving at your verdict consider only the facts testified to by the witnesses and the evidence offered and admitted, together with the instructions of the Court. And I deem it proper here to admonish you that you are not to consider evidence which may have been admitted and was afterwards stricken out of the record by the order of the Court.

Every witness is presumed to speak the truth, but this presumption is a disputable one, and it may be repelled by the manner in which the witness testifies, or by the character of his testimony, or by his motives in testifying, and the jury may reject the most positive testimony though the witness be not discredited by direct testimony. The inherent improbability of the statement may deny to the statement all claims to belief, and it is your duty in considering this case to determine whether or not the statement of any witness, testifying either for the prosecution or the defendants, is inherently improbable. If you believe that any statement is inherently improbable, you have the right to reject it. Nor are you bound to take the testimony of any witnesses as true, although such witnesses may not be contradicted. You are the exclusive judges of the credibility of the witnesses, and it is within your province to reject the
60 testimony of any or all witnesses who testified in this case, if you are not satisfied of its truth. In considering the credibility to be attached to the testimony of any witness or witnesses, you have the right to take into consideration the nature and character of such testimony, and if you have a reasonable doubt as to the credibility of any witness whose testimony is essential to a conviction you will resolve this doubt in favor of the defendants.

A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth, honesty and integrity is bad, and also by evidence that he has made at other times statements inconsistent with the testimony given by him at this trial, and if you find from the evidence that any witness sworn in this case has been successfully impeached, then it is within your province to reject the testimony of such impeached witness, and further if any witness has wilfully testified falsely, as to any material matter involved in this case, it is your duty, under the law of this state, to distrust the entire testimony of such witness, and testimony as to alleged admissions and

statements of the defendants should be received with caution. If you believe from the evidence herein that any witness was influenced or induced to become such and to testify in this case, by any promise of immunity from prosecution or punishment, or any hope held out that he would not be prosecuted for any offense or offenses committed by him, then the jury should take such facts into consideration, in determining the weight and credit which ought to be given to testimony thus obtained.

The fact that any defendant has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption of guilt,
61 or any unfavorable presumption or inference, because he has not testified in his own behalf.

If the evidence leaves it uncertain which, of two or more inferences from the fact proven, is the true inference, you must adduce that inference which is most favorable to the defendants, and if after considering all the evidence in this case, you are able to conscientiously reconcile such evidence upon any reasonable theory consistent with the defendants' innocence, you should do so.

Mere probabilities or suspicions are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendants are guilty than innocent.

The defendants are presumed to be men of good character and in this case, have introduced affirmative evidence as to such good character. Good character may in certain cases of itself create a doubt where otherwise none would exist, and this evidence must not be set aside by you to be considered only after you have reached a verdict independently thereof but must be considered by you in connection with all the evidence in the case, and if, after such consideration of all the evidence in the case, including that of good character, you entertain a reasonable doubt of the defendants' guilt, you must return a verdict of not guilty. On the other hand, if after a consideration of all the evidence including that of good character you are satisfied of the guilt of the defendants or any of them, you should so find notwithstanding such good character.

I have stated to you that the charge here is that of conspiracy, and a conspiracy may be defined as a confederacy formed by two or more persons to effect an unlawful purpose, said persons act-
62 ing under a common purpose to accomplish an unlawful end desired.

While a conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators, yet this does not mean that the parties must know that they are violating the statutes, or any statute of the United States. The only question for you to pass upon in this connection is whether the defendants conspired to do the things which were in violation of law,—not whether they had any knowledge that they were violating the law.

Upon the question of intent on the part of the defendants, you are instructed that the law presumes that every person intends the

natural and ordinary consequences of his act. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied, from declarations of the person himself, as to what he intended when he did a certain act. And this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case. Generally, upon this subject of conspiracy, I instruct you that it is competent for you to consider all the facts developed in the case for the purpose of answering the question as to whether or not a conspiracy was in fact entered into between the parties named in the indictment, or any of them.

Direct proof is not indispensable and a conspiracy may be shown by circumstances, but where the prosecution in a criminal case relies upon circumstantial evidence—that is, upon proof of facts and circumstances which are to be used as a means of arriving at the principal facts in question—it is a rule that these facts or circumstances must be fully proven in order to lay the basis for the conclusion which is sought to be established. Each circumstance essen-
63 tial to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. The burden of proof throughout is upon the prosecution to prove the guilt of the defendants. In a case depending upon circumstantial evidence alone the rule is, first, that the hypothesis of delinquency or guilt of the offense charged in the indictment must flow naturally from the facts proven and be consistent with them all, and, second, the facts proven must be such as to exclude every reasonable hypothesis or view but that of the guilt of the defendant of the offense imputed to him, or, in other words, the facts proven must all be consistent with the theory of guilt and inconsistent with the theory of innocence. Accordingly, before you would be justified in bringing in a verdict of guilty in this case, you must be satisfied, first, that the inference that there was a knowing intentional uniting by the defendants, or some of them, in a common design or purpose to handle opium as charged flows naturally from the facts proved and is consistent with them all, and, second, that the evidence must be such as to exclude every reasonable hypothesis or view except the one that the defendants, or some of them, did knowingly and intentionally unite in a common scheme or purpose to commit the acts charged. As to any defendant as to whom you are not convinced beyond all reasonable doubt, after applying these rules to the evidence, that he was actually a party, knowingly and intentionally, to a scheme to commit the offense charged, your verdict must be not guilty.

But while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose or purposes alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrange-

ment between themselves to effect such purpose or purposes;
64 the combination or common design or object may be regarded as proved if the jury believe from the evidence beyond a reasonable doubt that the defendants were actually pursuing in concert the unlawful object stated in the indictment, whether acting separately or together by common or different means; providing all were leading to the same unlawful result.

It is not necessary, in order to establish the fact of conspiracy, to prove by direct evidence that the parties met and actually agreed to jointly undertake such criminal action. Evidence is indirect as well as direct, indirect consisting of inferences and presumptions; and it is the law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury, by the exercise of their judgment and reason, based upon a consideration of the usual propensities or passions of men, the course of business or the course of nature, may make such deductions or draw such inferences from the facts proven, if such facts warrant it, as will establish the ultimate fact or facts in issue.

A conspiracy can seldom be proved by direct testimony. Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, the relation of these acts to each other, and their tendency, by united effect, to *rp*oduce the common result. In other words, where the jury finds that the acts of the several parties charged with conspiracy are the co-ordinates of each other, and are for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, showing a common design, they are at liberty to find that the various parties performing these several and respective acts were
65 engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before the jury to show that such parties ever entered into any agreement to commit such offense.

A conspiracy may be proved by showing the acts and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must necessarily be circumstantial in character and it will be sufficient if it leads to the conviction that such conspiracy in fact existed. Thus, if it be shown that the conspirators were apparently working to the same purpose—that is, one performing one part, and another, another part, each tending to the attainment of the same object so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effect that object.

It is as competent to prove an alleged conspiracy by circumstantial as by direct evidence. In prosecutions for criminal conspiracy, the proof of the combination charged must almost always be extracted from the circumstances connected with the transactions which form the subject of the accusation. The acts of the parties in the par-

ticular case, the nature of those acts, and the character of the transactions, or series of transactions, with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered as the source from which evidence may be derived of the existence or non-existence of an agreement, which may be express or implied, to do an unlawful act. Guilty connection with the conspiracy may be established by showing association by the persons accused in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent
66 to promote the common design, but each may perform separate acts or hold distinct relations in forwarding that design. There must be an intentional participation in the transaction or transactions with a view to the furtherance of the common design and purpose. If persons work together to achieve an unlawful scheme, having its promotion in view, and actuated by a common purpose of accomplishing the unlawful end, they are conspirators.

When a common purpose to prosecute an unlawful scheme has been shown beyond a reasonable doubt, the overt act or acts or declaration or declarations of any one or all concerned, in furtherance of and while engaged in the execution of such purpose, are admissible as illustrating the design and establishing the character or the original confederation, and after the existence of a conspiracy has been shown, the act or declaration of any one of the conspirators during the continuance thereof and to effect its purposes, is in law the act or declaration of all.

And, if you believe from the evidence, beyond a reasonable doubt, that any particular one of the defendants was actually pursuing in concert with any other person the unlawful object stated in the indictment, even though he were not a party to the conspiracy at the time when the original conspiracy was formed, if you find that such conspiracy was formed, but that he was aware of the conspiracy when he committed any overt act or acts in pursuance of that unlawful object, and in concert with any of the original parties to the conspiracy, the charge of conspiracy is established against that defendant, and you must find him guilty.

Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied to determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to
67 accord him the same fair and impartial consideration of his evidence, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case; but in passing upon the evidence of a defendant you have a right, precisely as with any other witness, to consider the interest he has in the result of the trial, and determine for yourselves how far that interest may have tended to color his evidence or cause him to deviate from the truth. You will understand from this merely that while there is no presumption against the truth of the evidence of a defendant any more than that of any other witness, nevertheless you are entitled to consider the interest he necessarily has in the result of the trial, and determine to what

extent it may have tended to affect his testimony before you. If, when so tested by these rules, it does not accord with your reason as being true, then you are not required to believe it.

Witnesses have been called in the course of the trial who have testified to their own participation in fraudulent and criminal practices. Criticism has been made of their testimony, and the weight to which it is entitled. The court instructs you on this subject that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the Government has the right to use them as witnesses. It is the duty of the Court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the
68 minds of the jury full and complete conviction of its truth. But where corroborating evidence is required, or is sought by the jury, it is the law that the testimony of one or more accomplices is not sufficient to corroborate the testimony of other accomplices.

While before you can find the defendants guilty of the charge alleged in the indictment, the evidence must satisfy you as to their guilt beyond a reasonable doubt, yet you will not understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the defendants' guilt, or the guilt of some of them to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence, and not consist of mere fanciful hesitation growing out of your sympathies or based upon something other than a fair and impartial consideration of the evidence in the case.

The term reasonable doubt means just what its language imports. To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Mere possible or fanciful or imaginary doubts are not reasonable doubts.

A reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, and no juror should vote for conviction so long as he entertains such reasonable doubt.

The Act of February 9th 1909, is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

69 "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States

opium in any form or any preparation or derivative thereof: Provided That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"SEC. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned), shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.

"Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

And finally. Your personal opinion as to facts not proved cannot in any manner be considered or used by you as the basis of your verdict. You may believe as men, that certain facts exist, but as Jurors, you can only act upon the evidence, introduced upon this trial, and from that evidence, and that alone, under the instructions of the Court, you must form your verdict, unaided, unassisted and uninfluenced by any opinion or presumption or belief you may have, except the presumption of innocence, not formed upon that testimony.

You may, if the evidence warrants it, render a verdict of guilty as to any one or more of the defendants, and may also, as in your judgment the evidence warrants, render a single verdict as to all of the defendants, or separate verdicts as to each.

It requires the concurrence of all of you to agree upon a verdict, and such verdict, as you may agree upon, you will have signed by your foreman, and returned into court.

The defendants J. J. Brolan, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, requested the Court to give certain instructions to the jury, as follows to-wit:

I.

"I instruct you to return a verdict of not guilty as to all of the defendants, because of insufficiency of the evidence."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

II.

"I charge you to return a verdict of 'not guilty' in this case against the defendant P. W. Craigie, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time al-
71 lowed by law and the rules of the Court, duly excepted to such refusal.

III.

"I advise you to return a verdict of 'not guilty' in this case against the defendant E. G. Gallagher, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

IV.

"I advise you to return a verdict of 'not guilty' in this case against the defendant Elias Ellison, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

V.

"I charge you to return a verdict of 'not guilty' in this case against the defendant E. E. Vargas, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

VI.

"I charge you to return a verdict of 'not guilty' in this case against the defendant J. J. Brolan, because of the insufficiency of the evidence given by the Government."

72 The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

VII.

"I charge you to return a verdict of 'not guilty' in this case against the defendant G. B. Balk, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

VIII.

"I charge you to return a verdict of 'not guilty' in this case against the defendant Soo Hoo Fong, because of the insufficiency of the evidence given by the Government."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

IX.

"I charge you that A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leong Duck and Charles May are accomplices, and must be corroborated."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

X.

"An accomplice may also be defined to be a person who
73 knowingly or voluntarily, unites in the commission of a crime, or associates in the commission of a crime, or is a partner in guilt; and the term 'accomplice' includes all participants in the commission of a crime."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XI.

"I charge you that the word 'accomplice' includes all persons who have been concerned in the commission of the offense."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XII.

"I charge you that the uncorroborated testimony of an accomplice in a crime, if contradicted under oath by himself, or contradicted by other witnesses, and inspired by the hope of immunity from punishment, to the effect that another was the instigator or participator in the perpetration of the crime, is not only insufficient to establish guilt beyond a reasonable doubt, but it presents no substantial evidence of it."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XIII.

"I charge you that if you find as a fact that any of the witnesses

testifying are accomplices, the following rule of evidence
74 must govern their testimony: That conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XIV.

"I charge you that a conviction cannot be had on the testimony of an accomplice, or any number of accomplices, unless the accomplices are corroborated by other evidence, which in itself and without the aid of the testimony of the accomplices tends to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, no matter how strong the testimony of such accomplices may be.

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XV.

"The testimony of an accomplice or any number of accomplices cannot be considered as a factor in the problem of guilt or innocence, until the jury first determine that the other evidence in the case proves the existence of the corroborative facts. If the evidence claimed to be corroborative does not tend, even when its truth is admitted, to connect the defendants with the commission of the offense of conspiracy without the aid of the testimony of the accomplice, it is the duty of the jury to find the defendants not guilty"

75 The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by the law and the rules of the Court, duly excepted to such refusal.

XVI.

"I charge you that although an accomplice may be corroborated in his testimony as to one defendant, that does not bind the other defendants concerning whom said accomplice was not corroborated."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XVII.

"I charge you that if you believe from the evidence that any of the following, A. J. Taylor, John McGough, C. G. Reay, Young

Tai, Manuel Joseph, Leon Duck or Charles May, are accomplices, then I charge you that those witnesses whom you find to be accomplices can not corroborate one another. In other words, accomplices cannot corroborate one another."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XVIII.

"You are further instructed that any admissions alleged to have been made by the defendants, testified to by an accomplice, are not in themselves, without the aid of other testimony, sufficient to corroborate the commission of the crime charged in the indictment."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XIX.

"I charge you that if you find that A. J. Taylor is an
76 accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said A. J. Taylor, and the evidence of such other witnesses as you find to be accomplices if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law, and the rules of the Court, duly excepted to such refusal.

XX.

"I charge you that if you find that John McGough is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said John McGough, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense, if there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants

before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

77 XXI.

"I charge you that if you find that C. G. Reay is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said C. G. Reay, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

XXII.

"I charge you that if you find that Young Tai is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Young Tai, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

78 XXIII.

"I charge you that if you find that Manuel Joseph is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Manuel Joseph, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXIV.

"I charge you that if you find that Leong Duck is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Leong Duck, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed
79 by law, and the rules of the court, duly excepted to such refusal.

XXV.

"I charge you that if you find that Charles May is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Charles May, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXVI.

"I charge you that although you should find from the evidence that in March 1913 the defendants, or one of them, contributed to the bond or defense of one Marney, such act would not be an overt act to effectuate the object of the conspiracy, as set forth in the second count of the indictment."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXVII.

"I charge you that if one of the four essentials of a criminal conspiracy, i. e. (1) An object to be accomplished which must be (*a*) the commission of an offense against the United States; (*b*)
80 to defraud the United States; (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. (4) An overt act by one or more of the conspirators to effect the object of the conspiracy; is lacking, the crime of conspiracy has not been proved, and you must bring in a verdict of 'not guilty', as to any of the defendants against whom the said proof as to the four essential elements of the said crime has not been shown, beyond all reasonable doubt, and to a moral certainty."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXVIII.

"I charge you that the elements of the crime of conspiracy are: (1) An object to be accomplished which must be (*a*) the commission of an offense against the United States; (*b*) to defraud the United States. (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. (4) An overt act by one or more of the conspirators to effect the object of the conspiracy."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXIX.

"I charge you that even if any number of persons should commit any number of wrongful and criminal acts of a similar na-
81 ture, but without a conspiracy or agreement among them previously made to commit such acts, none of them would be guilty of conspiracy, the crime charged in this indictment."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXX.

"I charge you that one person alone cannot commit the crime of conspiracy, but in order to constitute the offense, at least two persons must enter into an agreement, combination or understanding that they will do or procure to be done, some unlawful act, or do, or procure to be done, some act for an unlawful purpose."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXXI.

"I charge you that the corroboration of an accomplice or co-conspirator by other witnesses as to the commission of an overt act or overt acts is not corroboration of the testimony of such accomplices or co-conspirators as to the existence of the conspiracy."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXXII.

"I charge you that a conspiracy cannot be established by the testimony of any number of co-conspirators or accomplices standing alone, no matter how many such co-conspirators or accomplices may have testified."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time al-
82 lowed by law and the rules of the court, duly excepted to such refusal.

XXXIII.

"I charge you that the testimony of co-conspirators or accomplices is insufficient in itself to prove the existence of the conspiracy, unless such accomplices' testimony as to the existence of the conspiracy be corroborated by evidence which in itself tends directly or immediately to connect the defendants with such conspiracy.

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXXIV.

"I charge you that if there is no independent evidence of the existence of a conspiracy in this case, other than that of accomplices, then there is no corroboration as to the existence of the conspiracy; and in this connection I charge you that one co-conspirator or accomplice cannot corroborate another."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

XXXV.

83 *XXVI.*

"I charge you that in considering the evidence of any witness in this case, you have the right to take into consideration whether or not such witness, in becoming a witness for the prosecution, expects favors from such prosecution, or expects that he will be le-

niently dealt with in the disposition of his own case; and if you believe from the evidence, facts or circumstances in the case that such witness expects favors from the prosecution, you have the right, and it is your duty, to take such fact into consideration in weighing his testimony."

The Court refused to give said instruction, and the defendants before the retirement of the jury, and within the time allowed by law and the rules of the court, duly excepted to such refusal.

After the jury had returned a verdict of "guilty" and before sentence was imposed, the defendants J. J. Brolan, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong presented the following motion in arrest of Judgment:

In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
v.
HARRY BRADBROOK et al., Defendants.

84 *Motion to Arrest Judgment.*

The defendants in the above entitled cause, before judgment, respectfully move the court for error appearing on the face of the second count of the indictment and upon which count alone the verdict was rendered, and upon the face of the record, that judgment for the Government be arrested and withheld, and the conviction rendered herein be declared null and void.

Said motion is based upon the following grounds:

1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars or by imprisonment for any time not exceeding two years, or both," is contrary to the fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.

2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the

offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any
85 time not exceeding two years, or both," is contrary to the tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.

3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the states respectively, or to the people.

4. That the second section of the Act of February 9th, 1909, Chapter 100, 35 Stat. L. 614, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," has reference to the transportation and concealment of opium by persons who knowingly and fraudulently import or bring the same into the United States, or assist in so doing;
86 that the said second count of the indictment does not charge the defendants with having fraudulently or knowingly imported or brought into the United States, or assisted in so doing, any of said opium, it appearing upon the face of the record that the defendants were expressly acquitted of having conspired to import or bring into the United States the opium referred to, or to assist in so doing.

5. That the indictment violates the Sixth Amendment to the Constitution of the United States in that it fails to inform the defendants of the nature of the accusation against them.

6. That the indictment is contrary to Article 1, Section 8 of the Constitution of the United States, in that it does not come within the powers of Congress enumerated in Section 8 of Article 1, and is not a law necessary or proper to carry into execution such powers.

7. That the said acts charged in the second count of the indictment do not constitute a public offense against the laws of the United States.

8. That the second count of the indictment fails to show that the court has any jurisdiction over the alleged acts, either as to subject matter or to persons.

9. That the second count of the indictment does not state facts

sufficient to constitute a public offense against the laws of the United States.

10. That the second count of the indictment fails to charge the time when the alleged offense was committed.

11. That the second count of the indictment fails to charge the place where the alleged offense was committed.

12. That the second count of the indictment fails to sufficiently inform the defendants of the nature of the accusation against them.

87 13. That the second count of the indictment fails to charge the offense of conspiracy to wilfully and unlawfully receive, conceal, and facilitate the transportation and concealment after importation of certain opium and certain preparations and derivatives thereof.

14. The second count of the indictment is void in that it fails to show the time and place of the commission of the offense.

15. The second count of the indictment is void in that it fails to show the venue of the offense charged.

16. The second count of the indictment is void in that it does not appear therefrom that said receipt, concealment or facilitation of the transportation and concealment after importation of the said opium were to take place within the United States.

17. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to receive, conceal, or facilitate the transportation and concealment after importation of the said opium within the United States.

18. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to receive the said opium within the United States.

19. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to conceal the said opium within the United States.

20. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to facilitate the transportation of the said opium within the United States.

21. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined
88 and confederated to conceal after importation the said opium within the United States.

Wherefore, the above mentioned defendants pray that said judgment be arrested, that no sentence be imposed, and that said defendants go hence without day.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

The defendants, J. J. Brolan, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, hereby present the foregoing as their Bill of Exceptions herein, and re-

spectfully ask that the same may be allowed, signed, approved and made a part of the record in this case.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

Dated at San Francisco, California, this 19 day of June, A. D. 1914.

89 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Notice of Presentation of Bill of Exceptions.

To J. W. Preston, Esq., United States Attorney, Northern District of California:

You will please take notice that the foregoing constitute- and is the proposed Bill of Exceptions of the defendants in the above-entitled cause, and the said defendants will apply to the said Court to allow said Bill of Exceptions and to sign and approve the same as the Bill of Exceptions herein.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

June 19, 1914.

90 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Stipulation in re Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is correct and that the same may be signed, settled, allowed and approved by the Court.

JOHN W. PRESTON,
United States Attorney.
BERT SCHLESINGER.
JOHN L. McNAB.
S. C. WRIGHT.

Dated at San Francisco, California, this 13th day of Aug., A. D. 1914.

91 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Order Making Bill of Exceptions Part of the Record.

This Bill of Exceptions having been duly presented to the Court within the time allowed by law and the rules of the court and within the time extended by Order of the Court duly and regularly made, is now signed, approved and made a part of the Record in the case and is allowed as correct.

M. T. DOOLING,
Judge of the District Court of the United States, Northern District of California, Ninth Circuit.

Dated at San Francisco, California, this 18 day of August, A. D. 1914.

Due service and receipt of a copy of the within proposed bill of exceptions & notice thereof is hereby admitted this 19 day of June 1914.

JNO. W. PRESTON,
United States Attorney,
Attorney for Plaintiff.

(Endorsed:) Filed Aug. 19, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

92 At a Stated Term of the District Court of the United States of America for the Northern District of California, First Division, Held at the Court Room Thereof, in the City and County of San Francisco, on Tuesday, the 31st Day of March, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable M. T. Dooling, Judge.

No. 5339.

UNITED STATES
vs.
HARRY BRADBROOK et al.

(*Minutes, Verdict, etc.*)

The defendants herein on trial with their respective counsel, counsel for the Government and the jury sworn to try this case,

being present in open court, the further trial of this case was resumed. Mr. Preston, U. S. Atty., called W. H. Tidwell, who was duly sworn and examined on behalf of the Government. The cause was then submitted without argument. The court charged the jury, who at 10:40 o'clock a. m. retired to deliberate upon their verdict. By the court ordered that the said jurors and two bailiffs be furnished meals at the expense of the United States. At 3 o'clock p. m. said jurors came into court and requested that the testimony of Mrs. Reay be read, and after the reading of said testimony, the said jurors again retired, and at 5 o'clock p. m. again*st* returned into court, and upon being asked if they had agreed upon a verdict replied in the affirmative, and thereupon rendered the following verdicts in writing, and — by the court ordered that they be and are hereby recorded, viz:

"We, the jury, find Soo Hoo Fong, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

93 "We, the jury, find Tam Fai, the defendant at the bar guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find Joseph McKenna, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find E. J. Gallagher, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find P. W. Craigie, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find Max Miller, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find Elias Ellison, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find E. E. Vargas, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find G. B. Balk, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find J. J. Brolan, the defendant at the bar Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find Harry Bradbrook, the defendant at the bar Not Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find W. H. Brennan, the defendant at the bar, Not Guilty. Wm. N. McCarthy, Foreman."

"We, the jury, find Harry Bradbrook, J. J. Brolan, G. B. Balk, E. E. Vargas, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, Joseph McKenna, Tam Fai and Soo Hoo Fong, the defendants at the bar not guilty on the first count of the indictment herein. Wm. N. McCarthy, Foreman."

"We, the jury, find for the Government as to the plea of once in jeopardy interposed by the defendant Max Miller. Wm. N. McCarthy, Foreman."

94 And upon being asked if the foregoing verdicts as recorded were their verdicts, each of the jurors answered in the affirmative.

By the court ordered that defendant Max Miller appear for judgment to-morrow. Further ordered that the remaining defendants found guilty appear for judgment on April 9, 1914, at 10 o'clock a. m. Further ordered that execution herein be stayed until said date.

95 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al.

(*Verdict.*)

We, the Jury, find Harry Bradbrook, J. J. Borlan, G. B. Balk, E. E. Vargas, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, Joseph McKenna, Tam Fai and Soo Hoo Fong, the defendants at the bar, not guilty on the first count of the indictment herein

WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

96 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
E. J. GALLAGHER et al.

(*Verdict.*)

We, the Jury, find E. J. Gallagher, the defendant at the bar Guilty.

WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

97 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
G. B. BALK et al.

(*Verdict.*)

We, the Jury, find G. B. Balk, the defendant at the bar, Guilty.
WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

98 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
E. E. VARGAS et al.

(*Verdict.*)

We, the Jury, find E. E. Vargas, the defendant at the bar, Guilty.
WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

99 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
ELIAS ELLISON et al.

(*Verdict.*)

We, the Jury, find Elias Ellison, the defendant at the bar, Guilty.
WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

100 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
P. W. CRAIGIE.

(*Verdict.*)

We, the Jury, find P. W. Craigie, the defendant at the bar, Guilty.
WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

101 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
SOO HOO FONG et al.

(*Verdict.*)

We, the Jury, find Soo Hoo Fong, the defendant at the bar, Guilty.

WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

102 In the District Court of the United States in and for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
J. J. BROLAN et al.

(*Verdict.*)

We, the Jury, find J. J. Brolan, the defendant at the bar, Guilty.
WM. N. McCARTHY, *Foreman.*

(Endorsed:) Filed March 31, 1914, at 5 o'clock and — minutes P. M. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

103 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Motion for a New Trial.

Now come the defendants and move the Court for a new trial in the above-entitled cause upon the following grounds:

(1) That the verdict was against the evidence.

(2) That the Court erred in failing to give instructions numbered 1 to 68, as requested by the defendants, which were peremptory instructions asking for acquittal.

(3) That the Court erred in failing to give instruction numbered 70 to the effect that certain witnesses were accomplices, as requested by defendants.

(4) That the Court erred in failing to give instructions numbered 68 and 69, as requested by defendants, relating to the definition of an accomplice.

(5) That the Court erred in failing to give instructions numbered 72, 73, 74, 76 and 77, as requested by defendants, as to the necessity of corroboration of accomplices' and co-conspirators' testimony.

(6) That the Court erred in failing to give instruction number 78, as requested by defendants, as to the necessity of corroboration.

(7) That the Court erred in failing to give instructions numbered 72, 73, 74, 75 and 76, requested by defendants, as to
104 the kind of corroboration which is necessary in cases of accomplices' testimony.

(8) That the Court erred in failing to give instructions numbered 79, 80, 81, 82, 83, 84 and 85, requested by defendants, to the effect that the testimony of accomplices, if any witnesses be found to be such, must be corroborated by evidence tending directly and immediately to connect the defendants with the commission of the offense.

(9) That the Court erred in failing to give instruction numbered 86, as requested by defendants, to the effect that a certain act alleged as an overt act was not such.

(10) That the Court erred in failing to give instruction numbered 87, as requested by defendants, to the effect that a certain act alleged as an overt act was not such.

(11) That the Court erred in failing to give instructions numbered 90 and 91, requested by defendants, relating to the definition of the elements of a criminal conspiracy.

(12) That the Court erred in failing to give instructions num-

bered 88 and 89, requested by defendants, relating to the definition of the crime of conspiracy.

(13) That the Court erred in failing to give instruction numbered 92, requested by defendants, relating to corroboration of accomplices' testimony.

(14) That the Court erred in failing to give instructions numbered 93, 94 and 95, requested by defendants, as to the kind of testimony necessary to establish a conspiracy.

(15) That the Court erred in failing to give instructions numbered 96 and 97, requested by defendants, to the effect that the evidence of witnesses testifying with hopes of immunity must be scrutinized carefully.

(16) That the Court erred in admitting over defendants'
105 objections certain evidence of the witness Head relating to the two thousand dollars found in the house of defendant Max Miller.

(17) That the Court erred in admitting in evidence certain papers taken from the defendant Miller's home without a proper search warrant.

(18) That the Court erred in permitting in evidence, over defendants' objection, testimony of one Taylor, it having been shown prior to his testifying that he had been convicted of a felony.

(19) That the errors of the Court in respect to the above matters were and are of a substantial character, and were to the great detriment, injury and prejudice of the defendants, and in violation of the rights conferred upon them by law.

Wherefore, defendants pray that the verdict be set aside and a new trial granted.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

Due service and receipt of a copy of the within Motion for New Trial is hereby admitted this 13 day of April, 1914.

JNO. W. PRESTON,
U. S. Att'y.

(Endorsed:) Filed Apr. 13, 1914. W. B. Maling, Clerk, C. W. Calbreath, Deputy.

106 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al.

Motion to Arrest Judgment.

The defendants in the above entitled cause, before judgment, respectfully move the court for error appearing on the face of the second count of the indictment and upon which count alone the verdict was rendered, and upon the face of the record, that judgment for the Government be arrested and withheld, and the conviction rendered herein be declared null and void.

Said motion is based upon the following grounds:

1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars or by imprisonment for any time not exceeding two years, or both" is contrary to the fifth Amendment of the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.

107 2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" is contrary to the tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.

3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes — Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender

shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the states respectively, or to the people.

4. That the second section of the Act of February 9th, 1909, Chapter 100, 35 Stat. L. 614, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" has reference to the receiving, concealing, buying, selling, facilitating the transportation and concealment of opium by persons who knowingly and fraudulently import or bring the same into the United States, or assist in so doing; that the same second count of the indictment does not charge the defendants with having fraudulently or knowingly imported or brought into the United States, or assisted in so doing, any of said opium, it appearing upon the face of the record that the defendants were expressly acquitted of having conspired to import or bring into the United States the opium referred to, or to assist in so doing.

5. That the indictment violates the Sixth Amendment to the Constitution of the United States in that it fails to inform the defendants of the nature of the accusation against them.

6. That the indictment is contrary to Article 1, Section 8 of the Constitution of the United States, in that it does not come within the powers of Congress enumerated in Section 8 of Article 1, and is not a law necessary or proper to carry into execution such powers.

7. That the said acts charged in the second count of the indictment do not constitute a public offense against the laws of the United States.

8. That the second count of the indictment fails to show that the court has any jurisdiction over the alleged acts, either as to subject matter or to persons.

109 9. That the second count of the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

10. That the second count of the indictment fails to charge the time when the alleged offense was committed.

11. That the second count of the indictment fails to charge the place where the alleged offense was committed.

12. That the second count of the indictment fails to sufficiently inform the defendants of the nature of the accusation against them.

13. That the second count of the indictment fails to charge the offense of conspiracy to wilfully and unlawfully receive, conceal, and facilitate the transportation and concealment after importation of certain opium and certain preparations and derivatives thereof.

14. The second count of the indictment is void in that it fails to show the time and place of the commission of the offense.

15. The second count of the indictment is void in that it fails to show the venue of the offense charged.

16. The second count of the indictment is void in that it does not appear therefrom that said receipt, concealment or facilitation of the transportation and concealment after importation of the said opium were to take place within the United States.

17. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to receive, conceal, or facilitate the transportation and concealment after importation of the said opium within the United States.

18. That the second count of the indictment is void in that
110 it does not appear that the said defendants conspired, combined and confederated to receive the said opium within the United States.

19. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to conceal the said opium within the United States.

20. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to facilitate the transportation of the said opium within the United States.

21. That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to conceal after importation the said opium within the United States.

Wherefore, the above mentioned defendants pray that said judgment be arrested, that no sentence be imposed, and that said defendants go hence without day.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

Due service and receipt of a copy of the within Motion in arrest of Judgment is hereby admitted this 13th day of April, 1914.

JNO. W. PRESTON,
Att'y for U. S.

(Endorsed:) Filed Apr. 13, 1914. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

111 At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 13th day of April, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable M. T. Dooling, District Judge.

(Minutes—Order Denying Motions for New Trial and in Arrest of Judgment, etc.)

No. 5339.

UNITED STATES OF AMERICA
vs.
SOO HOO FONG et al.

In this case the defendants Soo Hoo Fong, Joseph McKenna, E. J. Gallagher, P. W. Craigie, E. Ellison, E. E. Vargas, G. B. Balk and J. J. Brolan were present in open Court with their attorneys, Bert Schlesinger, Esq., John L. McNab, Esq., Timothy Healy, Esq., and S. C. Wright, Esq., John W. Preston, Esq., appeared on behalf of the United States. Mr. Schlesinger on behalf of the defendants then filed a Motion for New Trial and Motion in Arrest of Judgment, which were argued by Mr. Schlesinger and Mr. McNab on behalf of the defendants and Mr. Preston, on behalf of the United States, and were, thereupon submitted to the Court and after due deliberation had thereon, the Court ordered that said motions be, and the same are hereby, denied. Thereupon, no legal cause being shown or appearing to the Court why judgments should not be passed upon the defendants herein, the Court ordered that defendants Soo Hoo Fong, E. Ellison and E. E. Vargas, be, and it is hereby ordered that each of them be, imprisoned in the County Jail of Alameda County, State of California, for a period of one year; that defendants G. B. Balk and J. J. Brolan be, and it is hereby ordered that each of them be, imprisoned in the County Jail
112 of Alameda County, State of California, for a period of eight months; that defendants E. J. Gallagher and P. W. Craigie be, and it is hereby ordered that each of them be, imprisoned in the County Jail of Alameda County, State of California, for a period of six months; that defendant Joseph McKenna be, and it is hereby ordered that he be imprisoned in the County Jail of Alameda County, State of California, for the period of three months. Further ordered that the Bail, pending Appeal of defendant Soo Hoo Fong, E. Ellison and E. E. Vargas, be, and the same is hereby, fixed in the sum of $2,500.00, as to each of said defendants, and that the Bond, pending Appeal of defendants Joseph McKenna, E. J. Gallagher, P. W. Craigie, G. B. Balk and J. J. Brolan be, and the same is hereby fixed in the sum of $2,000.00, as to each defendant.

113 (*Judgment.*)

In the District Court of the United States for the Northern District of California, First Division.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
SOO HOO FONG, JOSEPH MCKENNA, E. J. GALLAGHER, P. W. CRAIGIE, E. ELLISON, E. E. VARGAS, G. B. BALK, J. J. BROLAN.

Convicted of Receiving, Concealing, and Facilitating the Transportation and Concealment, After Importation, Certain Quantities of Smoking Opium. Viol. Sec. 37, Crim. Code U. S., Act. Feb. 9, 1909.

Judgment on Verdict of Not Guilty on the First Count of the Indictment and Guilty on the Second Count of the Indictment.

Now on this 13th day of April, 1914, the defendants, Soo Hoo Fong, Joseph McKenna, E. J. Gallagher, P. W. Craigie, E. Ellison, E. E. Vargas, G. B. Balk and J. J. Brolan, with their counsel Bert Schlesinger, Esq., John L. McNab, Esq., Tim Healy, Esq., and S. C. Wright, Esq., being present in open Court, comes John W. Preston, Esq., United States Attorney, and moves the Court that judgment be pronounced in this cause; whereupon the defendants were duly informed by the Court of the nature of the Indictment filed on the 2nd day of October, 1913, charging them with receiving, concealing and facilitating the transportation and concealment after importation, certain quantities of Opium and certain preparations and derivatives thereof, to-wit:—a large amount of opium prepared for smoking purposes; of their arraignment and pleas of Not Guilty; of their trial and the verdicts of the jury on the 31st day of March, A. D. 1914, to-wit:—

"We, the Jury, find Harry Bradbrook, J. J. Brolan G. B. Balk, E. E. Vargas, Elias Ellison, Max Miller, P. W. Craigie, E. J. Gallagher, Joseph McKenna, Tam Fai and Soo Hoo Fong, the defendants at the bar not guilty on the first count of the indictment herein."

114 "We, the Jury, find Soo Hoo Fong, the defendant at the bar Guilty."

"We, the Jury, find Joseph McKenna, the defendant at the bar Guilty."

"We, the Jury, find E. J. Gallagher, the defendant at the bar Guilty."

"We, the Jury, find P. W. Craigie, the defendant at the bar Guilty."

"We, the Jury, find Elias Ellison, the defendant at the bar Guilty."

"We, the Jury, find E. E. Vargas, the defendant at the bar Guilty."

"We, the Jury, find G. B. Balk, the defendant at the bar Guilty."

"We, the Jury, find J. J. Brolan, the defendant at the bar Guilty."

The defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being shown or appearing to the court, and the court having denied a motion for a new trial, and a motion in arrest of Judgment; thereupon the court rendered its judgment:

That whereas, the said Soo Hoo Fong, Joseph McKenna, E. J. Gallagher, P. W. Craigie, E. Ellison, E. E. Vargas, G. B. Balk, and J. J. Brolan, having been duly convicted in this Court of the crime of receiving, concealing and facilitating the transportation and concealment after importation, certain quantities of opium and certain preparations and derivatives thereof:—

It is therefore ordered and adjudged that the said defendants Soo Hoo Fong, E. Ellison, and E. E. Vargas each be imprisoned for the term of one year; that the defendants G. B. Balk, J. J. Brolan, each, be imprisoned for the term of eight months; that the defendants E. J. Gallagher and P. W. Craigie, each, be imprisoned for the term of six months; that the defendant Joseph McKenna be imprisoned for the term of three months;

Further ordered that the said terms of imprison*ed* be executed upon the said Soo Hoo Fong, E. Ellison, E. E. Vargas, G. B. Balk, J. J. Brolan, E. J. Gallagher, P. W. Craigie, and Joseph McKenna, by imprisonment in the County Jail of Alameda County, California.

115

Judgment entered this 13th day of April, A. D. 1914.

W. B. MALING, *Clerk.*
By C. W. CALBREATH,
Deputy Clerk.

Entered in Vol. 6, Judg. and Decrees at Page 60.

116 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Petition for Writ of Error.

Your Petitioners, J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher, and Soo Hoo Fong, defendants in the above-entitled cause, bring this their petition for Writ of Error to the District Court of the United States

in and for the Northern District of California, and in that behalf your petitioners show:

1. That on the 13th day of April, 1914, there was made, given and rendered in the above-entitled cause a judgment against your petitioners, wherein and whereby each of your petitioners was adjudged and sentenced to imprisonment for a term not exceeding twelve months in the Alameda County Jail.

2. And your petitioners show that they are advised by counsel, and they aver that there was and is manifest error in the record and proceedings had in said cause and in the making, giving and rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record and by an examination of the bill of exceptions to be tendered and filed and in the assignment of errors hereinafter set out and to be presented herewith; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the Supreme Court of
117 the United States, your petitioners now pray that a Writ of Error may be issued, directed therefrom to the District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause, and the same may be removed into the Supreme Court of the United States, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners make the assignment of errors presented herewith, upon which they will rely and which will be made to appear by a return of the said record in obedience to the said Writ.

Wherefore, your petitioners pray the issuance of a Writ as herein prayed, and pray that the assignment of errors, presented herewith, may be considered as their assignment of errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that they be awarded a supersedeas upon said judgment and all necessary and proper process, including bail.

Dated April 14, 1914.

J. J. BROLAN,
JOSEPH McKENNA,
G. B. BALK,
E. F. VARGAS,
ELIAS ELLISON,
P. W. CRAIGIE,
E. J. GALLAGHER,
SOO HOO FONG,
Petitioners.

BERT SCHLESINGER,
J. L. McNAB,
S. C. WRIGHT,
Attorneys for Petitioners.

Due service and receipt of a copy of the within petition for Writ of Error is hereby admitted this 14th day of April, 1914.

JOHN W. PRESTON, *U. S. Atty.*

(Endorsed:) Filed Apr. 14, 1914, W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

118 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Assignment of Errors.

J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, defendants in the above entitled cause, and plaintiffs in error herein having petitioned for an order from said Court permitting them to procure a Writ of Error to this court, directed from the Supreme Court of the United States, from the judgment and sentence made and entered in said cause against said J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, now make and file with their said petition the following assignment of errors herein, upon which they will apply for a reversal of said judgment and sentence upon the said Writ, and which said errors, and each and every one of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Northern District of California, there is manifest error in this, to-wit:

1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the
119 transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars or by imprisonment for any time not exceeding two years, or both" is contrary to the Fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.

2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes Large 614, the second section thereof, given in the words "or shall

receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.

3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less
120 than fifty dollars, or by imprisonment for any time not exceeding two years, or both" is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the states respectively, or to the people.

4. That the second section of the Act of February 9th, 1909, Chapter 100, 35 Stat. L. 614, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both" has reference to the receiving, concealing, buying, selling, facilitating the transportation and concealment of opium by persons who knowingly and fraudulently import or bring the same into the United States, or assist in so doing; that the said second count of the indictment does not charge the defendants with having fraudulently or knowingly imported or brought into the United States, or assisted in so doing any of said opium, it appearing upon the face of the record that the defendants were expressly acquitted of having conspired to import or bring into the United States the opium referred to, or to assist in so doing.

5. That the indictment violates the Sixth Amendment to the Constitution of the United States in that it fails to inform the defendants of the nature of the accusation against them.

6. That the indictment is contrary to Article 1, Section 8 of the Constitution of the United States, in that it does not come within the powers of Congress enumerated in Section 8 of Article 1, and is not a law necessary or proper to carry into execution such powers.

121 7. That the said acts charged in the second count of the indictment do not constitute a public offense against the laws of the United States.

8. That the second count of the indictment fails to show that the court has any jurisdiction over the alleged acts, either as to subject matter or to persons.

9. That the second count of the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

10. That the second count of the indictment fails to charge the time when the alleged offense was committed.

11. That the second count of the indictment fails to charge the place where the alleged offense was committed.

12. That the second count of the indictment fails to sufficiently inform the defendants of the nature of the accusation against them.

13. That the second count of the indictment fails to charge the offense of conspiracy to wilfully and unlawfully receive, conceal, and facilitate the transportation and concealment after importation of certain opium and certain preparations and derivatives thereof.

14. The second count of the indictment is void in that it fails to show the time and place of the commission of the offense.

15. The second count of the indictment is void in that it fails to show the venue of the offense charged.

16. The second count of the indictment is void in that it does not appear therefrom that said receipt, concealment or facilitation of the transportation and concealment after importation of the said opium were to take place within the United States.

122 (17) That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to receive, conceal, or facilitate the transportation and concealment after importation of the said opium within the United States.

(18) That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to receive the said opium within the United States.

(19) That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to conceal the said opium within the United States.

(20) That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to facilitate the transportation of the said opium within the United States.

(21) That the second count of the indictment is void in that it does not appear that the said defendants conspired, combined and confederated to conceal after importation the said opium within the United States.

22. That the verdict was against the evidence.

23. The Court erred in refusing to give instruction numbered 1, requested by defendants: "I instruct you to return a verdict of not guilty as to all of the defendants, because of insufficiency of the evidence," to which refusal an exception was duly made and entered at the time.

24. The Court erred in refusing to give instruction numbered 14, requested by defendants: "I charge you to return a verdict of "not

guilty" in this case against the defendant E. J. Gallagher,
123 for the reason that the evidence does not warrant a submission of the case to the jury," to which refusal an exception was duly made and entered at the time.

25. The Court erred in refusing to give the peremptory instructions requested by defendants, and each of them, numbered: 15, 18 to 21, inclusive, 24 to 27 inclusive, 30 to 33 inclusive, 36 to 39, inclusive, 42 to 45 inclusive, 48, 49, 62, 63, 66 and 67, for acquittal upon the second count of the indictment upon the grounds that the evidence does not warrant the submission of the case to the jury and because of the insufficiency of the evidence given by the Government, to which refusal the defendants, and each of them, duly excepted.

26. The Court erred in refusing to give instruction numbered 70, requested by defendants: "I charge you that A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leon Duck and Charles May are accomplices, and must be corroborated," to which refusal an exception was duly made and entered at the time.

27. The Court erred in refusing to give instruction numbered 68, requested by defendants: "An accomplice may also be defined to be a person who knowingly or voluntarily unites in the commission of a crime, or associates in the commission of a crime, or is a partner in guilt; and the term 'accomplice' includes all participants in the commission of a crime" to which refusal an exception was duly made and entered at the time.

28. The Court erred in refusing to give instruction numbered 69, requested by defendants: "I charge you that the word 'accomplice' includes all persons who have been concerned in the commission of the offense," to which refusal an exception was duly made and entered at the time.

29. The Court erred in refusing to give instruction numbered 72, requested by the defendants: "I charge you that the uncorroborated testimony of an accomplice in a crime, if contradicted
124 under oath by himself, or contradicted by other witnesses, and inspired by the hope of immunity from punishment, to the effect that another was the instigator or participator in the perpetration of the crime, is not only insufficient to establish guilt beyond a reasonable doubt, but it presents no substantial evidence of it," to which refusal an exception was duly made and entered at the time.

30. The Court erred in refusing to give instruction numbered 73, requested by the defendants: "I charge you that if you find as a fact that any of the witnesses testifying are accomplices, the following rule of evidence must govern their testimony; That conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof," to which refusal an exception was duly made and entered at the time.

31. The Court erred in refusing to give instruction numbered 74,

requested by the defendants: "I charge you that a conviction cannot be had on the testimony of an accomplice, or any number of accomplices, unless the accomplices are corroborated by other evidence, which in itself and without the aid of the testimony of the accomplices tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, no matter how strong the testimony of such accomplices may be," to which refusal an exception was duly made and entered at the time.

32. The Court erred in refusing to give instruction num-
125 bered 76, requested by defendants: "The testimony of an accomplice or any number of accomplices cannot be considered as a factor in the problem of guilt or innocence, until the jury first determine that the other evidence in the case proves the existence of the corroborative facts. If the evidence claimed to be corroborative does not tend, even when its truth is admitted, to connect the defendants with the commission of the offense of conspiracy without the aid of the testimony of the accomplice, it is the duty of the jury to find the defendants 'not guilty,'" to which refusal an exception was duly made and entered at the time.

33. That the Court erred in refusing to give instruction numbered 77, requested by defendants: "I charge you that although an accomplice may be corroborated in his testimony as to one defendant, that does not bind the other defendants concerning whom said accomplice was not corroborated," to which refusal an exception was duly made and entered at the time.

34. The Court erred in refusing to give instruction numbered 75, requested by defendants: "You are further instructed that any admissions alleged to have been made by the defendants, testified to by an accomplice, are not in themselves, without the aid of other testimony, sufficient to corroborate the commission of the crime charged in the indictment," to which refusal an exception was duly made and entered at the time.

35. The Court erred in refusing to give instruction numbered 78, requested by defendants: "I charge you that if you believe from the evidence that any of the following—A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leon Duck or Charles May—are accomplices, then I charge you that those witnesses whom you find to be accomplices cannot corroborate one another.
126 In other words, accomplices cannot corroborate one another," to which refusal an exception was duly made and entered at the time.

36. The Court erred in refusing to give instruction numbered 79, requested by defendants: "I charge you that if you find A. J. Taylor is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said A. J. Taylor, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or

immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

37. The Court erred in refusing to give instruction numbered 80, requested by the defendants: "I charge you that if you find that John McGough is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said John McGough, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

127 38. The Court erred in refusing to give instruction numbered 81, requested by defendants: "I charge you that if you find that C. G. Reay is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said C. G. Reay, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

39. The Court erred in refusing to give instruction numbered 82, requested by defendants: "I charge you that if you find that Young Tai is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Young Tai, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

40. The Court erred in refusing to give instruction num-
128 bered 83, requested by defendants: "I charge you that if you find that Manuel Joseph is an accomplice, then in order to determine whether his evidence is corroborated as required by law,

you must eliminate from the case the testimony of said Manuel Joseph, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

41. The Court erred in refusing to give instruction numbered 84, requested by defendants: "I charge you that if you find that Leon Duck is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Leon Duck, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

42. The Court erred in refusing to give instruction numbered 85, requested by defendants: "I charge you that if you find
129 that Charles May is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said Charles May, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

43. The Court erred in refusing to give instruction numbered 87, requested by defendants: "I charge you that although you should find from the evidence that in March 1913 the defendants, or one of them, contributed to the bond or defense of one Marney, such act would not be an overt act to effectuate the object of the conspiracy, as set forth in the second count of the indictment", to which refusal an exception was duly made and entered at the time.

44. The Court erred in refusing to give instruction numbered 92, requested by defendants: "I charge you that the corroboration of an accomplice or co-conspirator by other witnesses as to the commission of an overt act or overt acts is not corroboration of the testimony of such accomplices or co-conspirators as to the existence of the

conspiracy", to which refusal an exception was duly made and entered at the time.

45. The Court erred in refusing to give instruction numbered 93, as requested by defendants: "I charge you that a conspiracy cannot be established by the testimony of any number of
130 co-conspirators or accomplices standing alone, no matter how many such co-conspirators or accomplices may have testified.

46. The Court erred in refusing to give instruction numbered 94, requested by defendants: "I charge you that the testimony of co-conspirators or accomplices is insufficient in itself to prove the existence of the conspiracy, unless such accomplices' testimony as to the existence of the conspiracy be corroborated by evidence which in itself tends directly or immediately to connect the defendants with such conspiracy", to which refusal an exception was made and entered duly at the time.

47. The Court erred in refusing to give instruction numbered 95, requested by defendants: "I charge you that if there is no independent evidence of the existence of a conspiracy in this case, other than that of accomplices, then there is no corroboration as to the existence of the conspiracy, and in this connection I charge you that one co-conspirator or accomplice cannot corroborate another", to which refusal exception was duly made and entered at the time.

48. That the indictment is void in that it does not appear how or wherein said alleged importation was contrary to law, or when said importation was made.

49. The Court erred in overruling objection to the following questions propounded to the witness Joseph Head, the following having occurred at the trial in this connection:

Mr. PRESTON:

Q. Captain Head, what is your first name?

A. Joseph.

Q. Are you in the Customs service of the United States at the present time?

A. Yes. * * *

Q. Whose house was that supposed to be?

A. Max Miller, a Customs guard.

131 Q. One of the defendants here?

A. Yes.

Q. Who was with you when you made this search?

A. Inspector Huffaker.

Q. Tell us what you found in connection with money at that time? * * *

The COURT: When was this indictment filed?

Mr. PRESTON: In October.

The COURT: The objection will be overruled.

Mr. SCHLESINGER: I think, your Honor, I will cover the matter with a fu-ther objection, that it is not binding upon my defend-

ants, or Mr. McNab's defendant, and it is purely he-*re*say, and a matter occurring without the province of the defendants. * * *

Mr. SCHLESINGER: Exception.

A. I found $2,000 in a leather purse in Mr. Miller's flat.

Mr. PRESTON:

Q. In what particular place in this residence or flat of Miller's did you find the $2,000?

A. It was in the third room from the front door.

Q. What particular place in the room?

A. In the bureau.

* * * * * * *

Mr. SCHLESINGER: I will state the rule, and your Honor will read the authority. In the case of the United States v. Williams, there was a Chinese inspector charged with extortion. The amount of his salary was shown at the trial, I think some small amount, $125 a month. The government proved, over the objection of the defendant, that there was found to his credit in the Hibernia Bank, and, I believe, also in the German Bank, sums aggregating about $17,000; and for the admission of that evidence, the case was reversed. * * *

Mr. SCHLESINGER: No, I did not cover it, your Honor, I
132 simply read the authority. I wish to make the objection on the ground it is absolutely irrelevant, incompetent, immaterial, not binding upon any of the defendants, and incompetent for the reasons stated.

The COURT: Objection overruled.

Mr. SCHLESINGER: Exception.

Mr. PRESTON:

Q. How was this money wrapped?

Mr. SCHLESINGER: Same objection to this line of evidence already stated, and for the reasons set forth in that Williams case.

The COURT: Same ruling.

Mr. SCHLESINGER: Exception.

A. It was in a leather purse, and the purse wrapped in a newspaper, a part of the San Francisco "Examiner" of July 2nd, 1913.

Mr. PRESTON:

Q. What date did you make this search?

A. July 3, 1913.

50. The Court erred in overruling objection to the following questions propounded to the witness Joseph Head, the following having occurred at the trial in this connection:

Mr. PRESTON:

Q. I will a-k you whether or not on that occasion you found this card?

A. Yes.

Q. Where did you find that?

A. In that bureau containing the $2,000.

Q. Were the two packages together or not?

A. I could not state their relation to each other: they were in that bureau, I don't know how near.

Q. Do you mean by that they were in the same drawer of the bureau?

A. I am not certain as to that, right with this purse, here.

Mr. SCHLESINGER: One moment. We object to that upon
133 the ground that that comes within the rule against unlawful seizures of a man's private documents.

The COURT: There is not any proof that there is any unlawful seizure.

Mr. SCHLESINGER: Well, he just testified he took it out of his room.

The COURT: That does not, of itself, make it an unlawful seizure.

Mr. SCHLESINGER: May I examine him on that point?

The COURT: Yes.

Mr. SCHLESINGER:

Q. Captain, did Mr. Miller give you permission to take that card from his home?

A. No, sir.

Q. Did you have a search warrant, Captain?

A. Yes, sir.

Q. You had a search warrant?

A. Yes, sir.

Q. Will you please produce it?

A. This is it. (Handing to counsel.)

Mr. SCHLESINGER: Now, if your Honor please, having read this search warrant, we renew the objection, and ask that as a part of the objection, the search warrant be admitted in evidence, as a part of the objection.

Q. Did you have any other search warrant besides this?

A. No, sir.

Q. Did you have any search warrant authorizing you to search for letters, papers, memoranda or private documents?

A. That is the only search warrant we had.

Mr. BLACK: This is a search warrant for the finding of opium.

134 Mr. PRESTON: Just read the numbers contained on that card.

Mr. SCHLESINGER: Your Honor, may it be understood before they are finally read, that it goes in under the objections we have just enumerated?

Mr. BLACK: And that objection goes to the benefit of all the defendants?

The COURT: Surely.

Mr. SCHLESINGER: And also, in addition to that, we make the

objection that it is not binding on any of the defendants represented by Mr. McNab and Mr. Fallon, and take an exception.

The WITNESS: The first number is C 5003; the second number is P 1842; the third is 5154, P 105; the fourth is C or Z 6735; the fifth C 1217.

Mr. PRESTON:

Q. Do you know to what those numbers relate?

Mr. SCHLESINGER: If he knows of his own knowledge.

A. C. 5003 is the Home Telephone number of the Chinese at 742½ Washington Street, San Francisco, of the name of Chung Kai.

Mr. PRESTON: Chung Kai, called Sam Kai?

A. Yes. P 1842 is the telephone number of Charles Reay, a customs guard. 5154 is the Home Telephone number of a society of which Leong Duck is a member, a Chinese society; P 105 is Pekin 105, Wong Bat Mon, 719 Webster Street, Oakland; C 6735 is the Home Telephone number of Suey Hoo Fong, 854 Clay Street, San Francisco; C. 1217 is a Pacific States Telephone number of Chung Kai, or Sam Kai, at 742¼ Washington Street, San Francisco.

51. The Court erred in overruling objection to the following questions propounded to the witnesses A. J. Taylor, the following having occurred at the trial in this connection:

135 Mr. PRESTON:

Q. Your name is A. J. Taylor? A. Yes sir.

Mr. MCNAB: Just a moment. If your Honor please, will your Honor permit me, for a purpose which may be made evident by the question raised in Thompson v. United States, 202 Fed. to ask a question for the purpose of making an objection to the witness testifying?

The COURT: Yes, you may.

Mr. MCNAB:

Q. Mr. Taylor, what is your full name?

A. Alexander J. Taylor.

Q. Have you recently been convicted of a felony, in the Southern District of California?

A. Yes, sir.

Q. And sentenced to what prison?

A. San Quentin.

Q. For what period of time?

A. Two years, sir.

Q. Have you ever been pardoned?

A. No, sir.

Q. You are now an inmate of the state's prison?

A. Yes, sir.

Mr. MCNAB: If your Honor please, I desire to prove the exclusion of the testimony of the witness and object to his testifying upon the ground that he is an incompetent witness to testify, he having

been convicted of a felony, imprisoned in a federal penitentiary, which is a state penitentiary, and that he has never been pardoned. The only authority on the question that I have at hand is one which draws an inference but does not positively decide the question, Thompson v. United States, 202 Fed. page 406. I will show it to your Honor, if your Honor wishes, or I can read it to your Honor, just as you desire. (Reads.)

Mr. PRESTON: I always understood the law to be that that went to his credibility and not to his competency.

The COURT: The objection is overruled.

136 Mr. SCHLESINGER: We take an exception.

The witness Taylor testified as to the truth of the following overt act alleged in the indictment:

"And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Manuel Joseph, Elias Ellison, A. J. Taylor, Max Miller, E. E. Vargas, G. B. Balk, E. J. Gallagher, on the 20th day of June 1913, at the City and County of San Francisco, in the State and Northern District of California, contributed the sum of Twelve hundred and twenty-five (1225) Dollars for the case of John Marney, indicted for smuggling opium, One thousand (1,000) Dollars of which was to be used for his bond and the balance of Two Hundred and twenty-five (225) Dollars was to be used for other expenses in connection with his defense.

52. The Court erred in sentencing the defendants without their being first adjudged guilty of any crime.

53. The Court erred in pronouncing sentence of imprisonment against said defendants.

Dated April 14, 1914.

BERT SCHLESINGER
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants and Plaintiffs in Error.

137 Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 14th day of April, 1914.

JOHN W. PRESTON,
U. S. Att'y.

(Endorsed:) Filed Apr. 14, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

138 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas therein prayed for by defendants J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, Elias Ellison, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, pending the decision upon the writ of error are hereby allowed, and the defendants are admitted to bail upon the writ of error in sums as follows: J. J. Brolan, Joseph McKenna, G. B. Balk, P. W. Craigie and E. J. Gallagher are admitted to bail in the sum of Two Thousand Dollars ($2,000.00) each, and defendants E. E. Vargas, Elias Ellison and Soo Hoo Fong are admitted to bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00) each. The bond for costs upon the writ of error is hereby fixed at $500.00.

Dated at San Francisco, California, this 14th day of April, A. D. 1914.

M. T. DOOLING,
Judge of the District Court of the United States for the Northern District of California.

Due Service and receipt of a copy of the within Order allowing Writ of Error is hereby admitted this 14 day of April 1914.

JOHN W. PRESTON,
U. S. Att'y.

(Endorsed:) Filed Apr. 14, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

139 (*Writ of Error—Copy.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between J. J. Brolan, Joseph McKenna, G. B. Balk, Elias Ellison, E. E. Vargas, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great

damage of the said J. J. Brolan, Joseph McKenna, G. B. Balk, Elias Ellison, E. E. Vargas, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at the City of Washington in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable M. T. Dooling, Judge of the District Court of the United States, for the Northern District of
140 California, First Division, the fourteenth day of April, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

W. B. MALING,
Clerk of the District Court of the United States for the Northern District of California, First Division.

[SEAL.] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by
M. T. DOOLING,
Judge of the District Court of the United States for the Northern District of California, First Division.

Due service and receipt of a copy of the within Writ of Error is hereby admitted this 15th day of April, 1914.

JNO. W. PRESTON,
Att'y for Defendant in Error.

(Endorsed:) Filed Apr. 15, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

141 *(Citation on Writ of Error—Copy.)*

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the thirteenth day of June

A. D. 1914, pursuant to a Writ of Error duly issued and now on file in the clerk's office of the District Court of the United States for the Northern District of California, Division Number 1, wherein J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, E. J. Gallagher, P. W. Craigie, Elias Ellison and Soo Hoo Fong are plaintiffs in error and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. T. Dooling Judge of the District Court of the United States for the Northern District of California, Division Number one, this fourteenth day of April, A. D. 1914, and of the Independence of the United States, the one hundred and thirty-eighth.

M. T. DOOLING,
District Judge.

142 Service of within Citation, by copy, admitted this fourteenth day of April A. D. 1914.

JNO. W. PRESTON,
Attorney for Defendants in Error.

(Endorsed:) Filed Apr. 15, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

143 In the District Court of the United States for the Northern District of California, First Division.

UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

(*Stipulation and Order that Bill of Exceptions May be Settled During July, 1914, Term.*)

It is hereby stipulated and agreed that the Bill of Exceptions in the above entitled cause proposed by certain of the defendants in this action, may be settled by said Court or the Judge thereof during the July term of the year 1914.

Dated July 1st, 1914.

BERT SCHLESINGER.
J. L. McNAB.
S. C. WRIGHT.

JNO. W. PRESTON.
United States Attorney.

So Ordered:
M. T. DOOLING, *Judge.*

Dated July 1st, 1914.

(Endorsed:) Filed Jul- 1, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

144 In the District Court of the United States in and for the Northern District of California.

No. 5339.

THE UNITED STATES OF AMERICA
vs.
HARRY BRADBROOK et al., Defendants.

(Stipulation as to Cost and Supersedeas Bonds.)

It is hereby stipulated by and between the parties hereto that the cost and supersedeas bonds of the defendants have been approved by the above entitled court and filed in the office of the clerk thereof.

Dated at San Francisco, California, this 2nd day of September, 1914.

JNO. W. PRESTON,
U. S. District Attorney.
BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendants.

(Endorsed:) Filed Sep. 5, 1914, at 12 o'clock and 40 min. P. M. W. B. Maling, Clerk, by T. L. Baldwin, Deputy Clerk.

145 *Certificate of Clerk to Transcript on Writ of Error.*

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 144 pages, numbered from 1 to 144, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America vs. Harry Bradbrook et al., numbered 5,339, as the same now remain on file and of record in the office of the Clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Præcipe for Record on Writ of Error," copy of which is embodied in this transcript, and the instructions of the Attorneys for Defendants and Appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Writ of Error is the sum of Seventy Nine Dollars and Thirty Cents ($79.30), and that the same has been paid to me by the Attorneys for Appellants herein.

Annexed hereto is the Original Citation on Writ of Error (pages 150 and 151) and the Original Writ of Error (pages 146, 147 and 148) with the return of the said District Court to said Writ of Error attached thereto (page 149).

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of September, A. D. 1914.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING, *Clerk*,
By LYLE S. MORRIS,
Deputy Clerk.

C. M. T.

146 (*Writ of Error—Original.*)

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between J. J. Brolan, Joseph McKenna, G. B. Balk, Elias Ellison, E. E. Vargas, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said J. J. Brolan, Joseph McKenna, G. B. Balk, Elias Ellison, E. E. Vargas, P. W. Craigie, E. J. Gallagher and Soo Hoo Fong, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at the City of Washington in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

147 Witness, the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

[Seal of the U. S. District Court, Northern Dist. of California.]

W. B. MALING,
Clerk of the District Court of the United States for the Northern District of California, First Division.
C. W. CALBREATH,
Deputy Clerk. U. S. District Court, Northern District of California.

Allowed by
M. T. DOOLING,
Judge of the District Court of the United States for the Northern District of California, First Division.

148 Due service and receipt of a copy of the within Writ of Error is hereby admitted this 15th day of April, 1914.
JNO. W. PRESTON,
Att'y for Defendant in Error.

[Endorsed:] No. 5339. In the District Court of the United States for the Northern District of California, First Division. H. Bradbrook et al., Plaintiffs in error, vs. The United States of America, Defendant in error. Writ of error. Filed Apr. 15, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk. Bert Schlesinger, Attorney for Plaintiffs in error, Claus Spreckels Building, San Francisco, Cal.

149 *Return to Writ of Error.*

The Answer of the Judges of the District Court of the United States of America for the Northern District of California to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States of America, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 15th day of April, A. D. 1914, duly lodged in the case in this Court for the within named defendants in Error.

By the Court:

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING, *Clerk,*
By LYLE S. MORRIS,
Deputy Clerk.

150 (*Citation on Writ of Error—Original.*)

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the thirteenth day of June, A. D. 1914, pursuant to a Writ of Error duly issued and now on

file in the clerk's office of the District Court of the United States for the Northern District of California, Division Number 1, wherein J. J. Brolan, Joseph McKenna, G. B. Balk, E. E. Vargas, E. J. Gallagher, P. W. Craigie, Elias Ellison and Soo Hoo Fong are plaintiffs in error and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. T. Dooling, Judge of the District Court of the United States for the Northern District of California, Division Number one, this fourteenth day of April, A. D. 1914, and of the Independence of the United States, the one hundred and thirty-eighth.

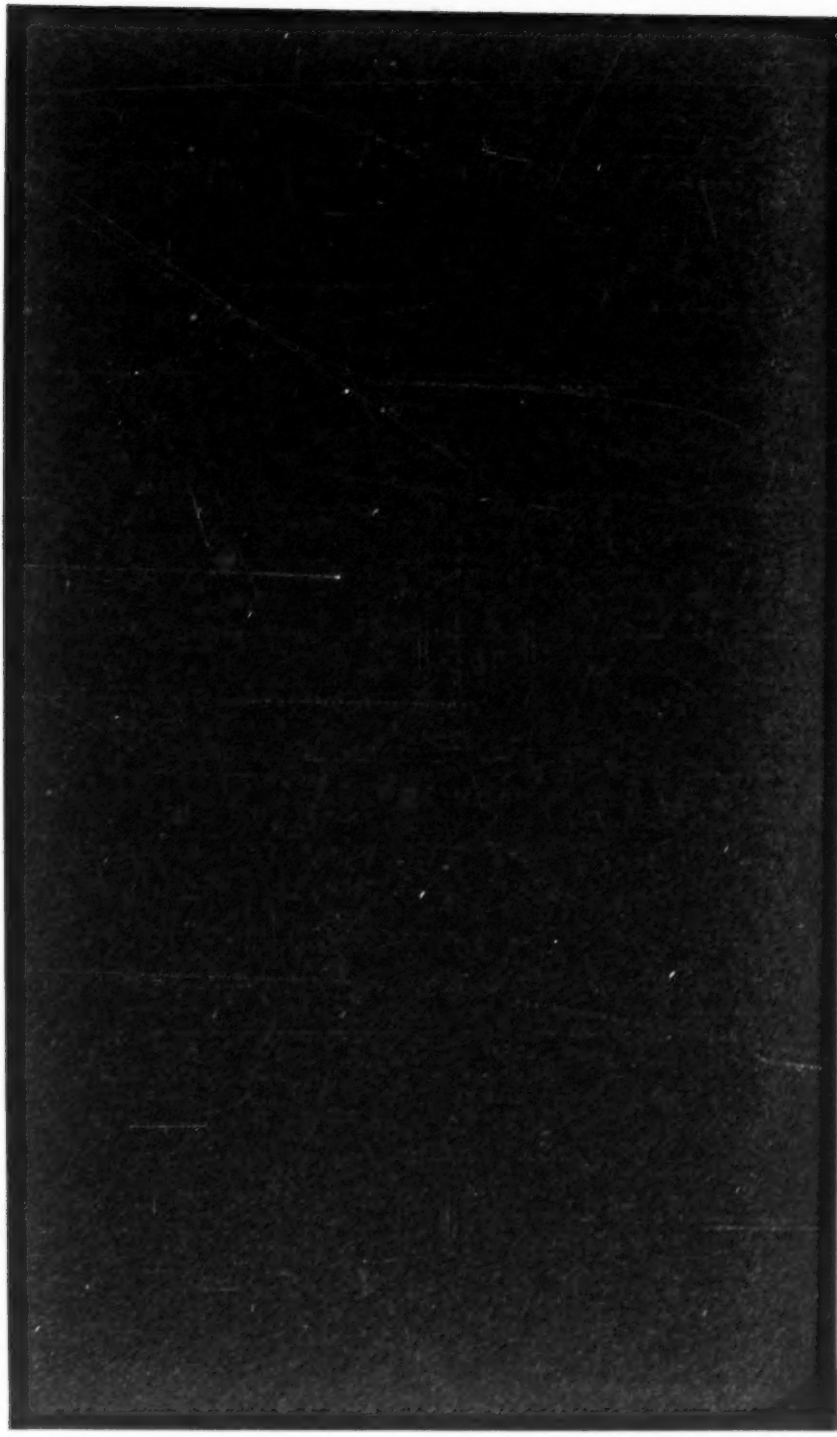
M. T. DOOLING,
District Judge.

151 Service of within Citation, by copy, admitted this fourteenth day of April, A. D. 1914.

JNO. W. PRESTON,
Attorney for Defendants in Error.

[Endorsed:] 5339. In the Supreme Court of the United States. H. Bradbrook et al., Plaintiffs in error, vs. The United States of America, Defendant in error. Citation. Filed April 14th, 1914. Filed Apr. 15, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

Endorsed on cover: File No. 24,389. N. California D. C. U. S. Term No. 645. J. J. Brolan, Joseph McKenna, G. B. Balk, et al., plaintiffs in error, vs. The United States. Filed October 5th, 1914. File No. 24,389.



In the Supreme Court of the United States.

OCTOBER TERM, 1914.

J. J. BROLAN ET AL., PLAINTIFFS IN ERROR,
v.
THE UNITED STATES.
No. 645.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this cause for hearing on a day convenient to the court during the present term.

Plaintiffs in error were tried in the District Court for the Northern District of California on an indictment charging them and others with conspiracy to commit offenses against the United States, to wit, in the first count the importation of opium for smoking purposes, and in the second count receiving, concealing, etc., after importation, of opium for smoking purposes, in violation of the act of February 9, 1909, 35 Stat. 614.

They were found guilty on the second count and sentenced to various terms of imprisonment, ranging from three months to one year. They are now at large on bail.

A writ of error has been sued out from this court on the ground *inter alia* that that part of the second section of the act of February 9, 1909, which reads as follows:

> or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium, or preparation or derivative thereof, after importation, knowing the same to have been imported contrary to law, such opium, or preparation or derivative thereof, shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.

is unconstitutional.

As the decision of this court will determine whether future prosecutions may be had under that part of section 2 of the act in question, an early disposition of the cause is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 645.

J. J. BROLAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO AMEND WRIT OF ERROR.

The plaintiff in error, J. J. Brolan *et al.*, by their attorney, Edward M. Cleary, respectfully move the court that the writ of error in the above-entitled cause be amended under R. S., sec. 1005, by substituting for the *teste* clause in its present form, *i. e.*,

Witness the Honorable M. T. Dooling, judge of the District Court of the United States for the Northern District of California, First Division, the fourteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.,

which clause was inadvertently made a part of the record in this cause, a *teste* clause in proper form, *i. e.*,

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

EDWARD M. CLEARY,
Attorney for Plaintiffs in Error.

October, 1914.

[26653]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 645.

J. J. BROLAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiffs in Error.

P. S. EHRLICH,
EDW. M. CLEARY,
Of Counsel.

SUBJECT INDEX.

I. Statement of the Cases and Questions Involved.

	Page
1. Facts	1–3
2. Questions involved	3–5
(a) The section of opium statute here at issue is unconstitutional	4
(b) Refusal of the court to give instruction on corroboration of accomplice testimony	4
(c) Error in admitting in evidence the finding of $2,000.00 in defendant Miller's home	5
(d) Error in admitting a felon to testify	5

II. Specification of Errors.

1. That the section of the opium statute under which the conviction was had is unconstitutional	6–7
2. That the court erred in refusing to instruct that no conviction for a felony may be had on the uncorroborated testimony of accomplices	8–12
3. The court erred in admitting in evidence, over the objection of defendants, the testimony of the witness Head, called by the Government, as to the finding of $2,000.00 in the home of the defendant Miller	12–14
4. The court erred in admitting, over the objection of defendants, the testimony of the witness A. J. Taylor, called by the Government, it having been proved that Taylor had been convicted of a felony and was unpardoned	14–15

III. Argument.

1. Part of a section of the opium statute under which these plaintiffs in error were convicted, the act of February 9, 1909, chapter 100, 35 Stat. L., 614, is unconstitutional	16
(a) Power not granted by the Constitution to the Federal Government	16
(b) Exercise of a police power of the State	17
2. The admission of testimony of the witness Head as to the finding of $2,000.00 in the home of defendant Miller, an alleged co-conspirator, was prejudicial error	45
(a) Testimony was incompetent, irrelevant, and immaterial.	45

Page

3. It appearing from the evidence that the witness A. J. Taylor had been convicted of a felony and had never been pardoned, his testimony was inadmissible..... 48
   (a) A felon is an incompetent witness in a criminal trial in Federal courts..... 49
4. The court erred in refusing to give various instructions, all seeking to establish the rule of law that a conviction cannot be had on the uncorroborated evidence of an accomplice..... 58
   (a) No conviction can be had on the uncorroborated testimony of accomplices..... 58

List of Cases.

Abby Dodge vs. United States, 223 U. S., 166; 56 L. Ed., 393.... 33
Boyde vs. United States, 142 U. S., 453; 35 L. Ed., 1078..... 52
Butts vs. Merchants' Trans. Co., 230 U. S., 126; 35 Sup. Ct., 964; 57 L. Ed., 1422..... 29,34
Champion vs. Ames, 188 U. S., 321; 47 L. Ed., 492..... 29
Employers' Liability Cases, 207 U. S., 463; 28 Sup. Ct., 141; 52 L. Ed., 297..... 29,34
El Paso Rd. Co. vs. Gutierrez, 215 U. S., 87; 54 L. Ed..... 34
Ex parte Wells, 59 U. S.; 18 How., 307, 315 (15:421, 425)..... 52
Ex parte Garland, 71 U. S.; 4 Wall., 333, 380 (18:366, 370); 4 Bl. Com., 402..... 52
Grimm vs. United States, 156 U. S., 608; 15 Sup. Ct. Rep., 470... 67
In re Heff, 197 U. S., 488; 49 L. Ed., 848..... 26,31
Hoke vs. United States, 227 U. S., 322; 57 L. Ed., 927..... 23,31
Holmgreen case, 166 Fed., 440, and later in 217 U. S., 509..... 66
Hypolite Egg Co. vs. United States, 220 U. S., 45; 55 L. Ed., 365. 38
Illinois Central Ry. Co. vs. McKendree, 203 U. S., 514; 27 Sup. Ct., 153; 51 L. Ed., 298..... 29,34
Keliher vs. United States, 193 Fed., 15..... 63
License Cases, 5 Howard, 504..... 28
Mugler vs. State of Kansas, 123 U. S., 623; 31 L. Ed., 205..... 28
Maxey vs. United States, 207 Fed., 330..... 55
McDermott vs. Wisconsin, 228 U. S., 115; 57 L. Ed., 755..... 40
New York vs. Miln, 11 Peters, 102..... 32
Patterson vs. Kentucky, 97 U. S., 501..... 28
Philadelphia Pickling Co. vs. United States, 202 Fed., 152..... 41
Pitner vs. State, 23 Tex. App., 374..... 52
People vs. Eckett, 16 Cal., 112..... 60
People vs. Ames, 39 Cal., 403..... 61
Reagan vs. United States, 157 U. S., 301; 39 L. Ed., 712..... 68
Sykes vs. United States, 204 Fed., 913..... 64

	Page.
Savage vs. Jones, 225 U. S., 501; 56 L. Ed., 118	39
Shawnee Milling Co. vs. Temple, 179 Fed., 522	41
Thompson vs. United States, 202 Fed., 406	53
Trade-mark Cases, 100 U. S., 82; 25 L. Ed., 550	29, 34
United States vs. Williams, 168 U. S., 382; 42 L. Ed., 513	46
United States vs. Logan, 144 U. S., 303; 36 L. Ed., 413	49, 51
United States vs. Hughes, 175 Fed., 240	49, 52
United States vs. Wilson, 32 U. S.; 7 Pet., 150 (8:640)	52
United States vs. Lancaster, 44 Fed., 921	61, 62
United States vs. Hinz, 35 Fed., 277	61
United States vs. Caminata, 194 Fed., 905	17
United States vs. Keller, 213 U. S., 138; 53 L. Ed., 737	18
United States vs. Krsteff, 185 Fed., 203	22
United States vs. Dewitt, 19 L. Ed., 594; 9 Wall., 41	24
United States vs. Gould, No. 15,239, 25 Fed. Cases, 1375	26
United States vs. Reese, 92 U. S., 214; 23 L. Ed., 563	34
Vance vs. W. A. Vandercook, 170 U. S., 438; 42 L. Ed., 1101	36
Whart. Crim. Ev., section 365	52

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 645.

J. J. BROLAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of the Case and Questions Involved.

The plaintiffs in error were convicted of an alleged violation of section 5440 of the Revised Statutes, or section 37 of the Criminal Code, of the United States, and the act of February 9, 1909, chap. 100, 35 Stat. L., 614.

The indictment was presented and filed in the United States District Court of the Northern District of California on the second Monday in July, 1913.

The indictment contained two counts. In the first count it was alleged that the plaintiffs in error conspired together to smuggle opium into the United States. The judge of the district court dismissed the first count of said indictment as being fatally defective, in that the overt acts to effectuate the smuggling of opium into the United States were all acts done after the smuggling or importing into the United States had been completed.

The second count of said indictment alleged that the plaintiffs in error, from and between the dates of May, 1910, to July, 1913, conspired, combined and confederated together to receive, conceal, and facilitate the transportation and concealment after importation of certain opium and certain preparations and derivatives thereof, for smoking purposes, which opium the plaintiffs in error knew had been theretofore unlawfully imported into the United States. It will be unnecessary to set forth these alleged overt acts in view of the fact that they are all similar and identical in character and in that they set forth the taking of a certain amount of opium from certain vessels while at the docks within the city and county of San Francisco, State of California. (See Transcript on Appeal, page 8.) There is also an overt act alleged to the effect that the plaintiffs in error assumed fictitious names during the course of the transactions and also an overt act alleged to the effect that some of the plaintiffs in error contributed a certain sum to the defense of one Marney, indicted for smuggling opium. (See Transcript on Appeal, page 11.) The indictment then concludes that all of the acts above mentioned and alleged in second count of said indictment occurred in the city and county of San Francisco, State of California.

Upon the trial of said cause the Government relied solely upon the testimony of certain defendants in the above in-

dictment. These defendants—A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leong Duck, and Charles May—testified in substance as to the commission of the overt acts hereinbefore set forth (Transcript on Appeal, page 15).

With the exception of the testimony of A. J. Taylor (whose testimony was objected to on the ground that he was a felon and incompetent to testify without a pardon), there is no evidence to establish or corroborate in anywise or in any degree the formation of the conspiracy or the commission of the overt acts alleged in this indictment. The Government in this case rests solely upon the uncorroborated testimony of accomplices, and there is no evidence of any kind or character other than the evidence of these accomplices. (See Transcript on Appeal, page 20.)

It is unnecessary to set forth here the evidence given by these accomplices, as it is a recital and in practical effect, nothing more nor less than a repetition of the overt acts set forth in the second count of the indictment. In other words, the Government in this case had certain defendants plead guilty and testify against their co-defendants. And there is, as said before, no independent evidence in anywise connecting plaintiffs in error with formation of the conspiracy or the commission of the overt acts other than the accomplices' testimony. (See Transcript on Appeal, page 20.)

On the other hand, we have the evidence of each and every defendant, in which the defendants absolutely and unqualifiedly deny the testimony of said accomplices, and in which each and every defendant denies the formation of the conspiracy and the commission of the overt acts alleged in the indictment. (See Transcript on Appeal, page 22).

This case is before the court solely on questions of law. The records show by the testimony of the accomplices themselves that they were co-defendants in the second count of

the indictment, and that they were implicated in the formation of the alleged conspiracy and the commission of each and every alleged overt act of which the plaintiffs in error were found guilty.

There are a number of questions raised in this case by the assignment of errors on the writ of error. To enumerate briefly, as required by the rules of this court, the questions to be raised are as follows:

1. That the section of the opium statute here involved, to wit, that part of the section which makes it a crime to receive, conceal, or facilitate the transportation of opium after importation, knowing the same to have been unlawfully imported, is unconstitutional, in that it is an assumption by Congress of the police power delegated to the State, and in that it is not justified by the commerce clause or any other power in the Constitution, in that it applies equally to intra and foreign and inter state commerce, and is an exercise of a power not granted Congress by the Constitution. (See Transcript on Appeal, page 68.)

2. That the court erred in refusing to give certain instructions:

(*a*) In refusing to give a definition of "accomplice" to the jury, and to instruct that certain witnesses testifying in this case were accomplices.

(*b*) In refusing to instruct the jury that an accomplice must be corroborated in his testimony in certain particulars, and that the corroboration of an accomplice sufficient to sustain a conviction must be corroboration which tends to connect the defendant with the commission of the offense; that the corroboration of an accomplice by independent evidence as to one defendant is not corroboration as to all of them.

(c) In refusing to instruct the jury that corroboration as to an overt act is not corroboration as to the existence of the conspiracy. (See Transcript on Appeal, page 71.)

3. That the court erred in admitting in evidence the fact that two thousand dollars was found in a leather purse in the home of one of the defendants, it not being shown from where the said defendant obtained the said money, and no connection being shown that the money so found was obtained from the acts set forth in the indictment. (See Transcript on Appeal, page 75.)

4. That the court erred in admitting the testimony of A. J. Taylor, a felon; it appearing that the said A. J. Taylor had been convicted of a felony and had not been pardoned at the time his evidence was admitted. (See Transcript on Appeal, page 78).

II.

SPECIFICATIONS OF ERROR.

Specification (1).

THAT THE SECTION OF THE OPIUM STATUTE UNDER WHICH THE CONVICTION WAS HAD IS UNCONSTITUTIONAL.

(*a*) That the act of February 9, 1909, chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," is contrary to the Fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law.

(*b*) That the act of February 9, 1909, chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," is contrary to the

Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution.

(*c*) That the act of February 9, 1909, chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both," is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the States respectively, or to the people.

(*d*) That the said acts charged in the second count of the indictment do not constitute a public offense against the laws of the United States.

(*e*) That the second count of the indictment fails to show that the court has any jurisdiction over the alleged acts, either as to subject-matter or to persons.

(*f*) That the second count of the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

(*g*) That the second count of the indictment fails to charge the time when the alleged offense was committed. (Transcript on Appeal, page 70.)

Specification (2).

THAT THE COURT ERRED IN REFUSING TO INSTRUCT THAT NO CONVICTION FOR A FELONY MAY BE HAD ON THE UNCORROBORATED TESTIMONY OF ACCOMPLICES.

(*a*) The court erred in refusing to give instruction numbered 70, requested by defendants: "I charge you that A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leon Duck, and Charles May are accomplices, and must be corroborated," to which refusal an exception was duly made and entered at the time. (Transcript on Appeal, page 71.)

(*b*) The court erred in refusing to give instruction numbered 68, requested by defendants: "An accomplice may also be defined to be a person who knowingly or voluntarily unites in the commission of a crime, or associates in the commission of a crime, or is a partner in guilt, and the term 'accomplice' includes all participants in the commission of a crime," to which refusal an exception was duly made and entered at the time.

(*c*) The court erred in refusing to give instruction numbered 69, requested by defendants: "I charge you that the word 'accomplice' includes all persons who have been concerned in the commission of the offense," to which refusal an exception was duly made and entered at the time.

(*d*) The court erred in refusing to give instruction numbered 72, requested by the defendants: "I charge you that the uncorroborated testimony of an accomplice in a crime, if contradicted under oath by himself, or contradicted by other witnesses, and inspired by the hope of immunity from

punishment, to the effect that another was the instigator or participator in the perpetration of the crime, is not only insufficient to establish guilt beyond a reasonable doubt, but it presents no substantial evidence of it," to which refusal an exception was duly made and entered at the time.

(*e*) The court erred in refusing to give instruction numbered 73, requested by the defendants: "I charge you that if you find as a fact that any of the witnesses testifying are accomplices, the following rule of evidence must govern their testimony: That conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof," to which refusal an exception was duly made and entered at the time.

(*f*) The court erred in refusing to give instruction numbered 74, requested by the defendants: "I charge you that a conviction cannot be had on the testimony of an accomplice, or any number of accomplices, unless the accomplices are corroborated by other evidence, which in itself and without the aid of the testimony of the accomplices tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, no matter how strong the testimony of such accomplices may be," to which refusal an exception was duly made and entered at the time.

(*g*) The court erred in refusing to give instruction numbered 76, requested by defendants: "The testimony of an accomplice or any number of accomplices cannot be considered as a factor in the problem of guilt or innocence until the jury first determine that the other evidence in the case

proves the existence of the corroborative facts. If the evidnce claimed to be corroborative does not tend, even when its truth is admitted, to connect the defendants with the commission of the offense of conspiracy without the aid of the testimony of the accomplice, it is the duty of the jury to find the defendants 'not guilty,'" to which refusal an exception was duly made and entered at the time.

(*h*) That the court erred in refusing to give instruction numbered 77, requested by defendants: "I charge you that although an accomplice may be corroborated in his testimony as to one defendant, that does not bind the other defendants concerning whom said accomplice was not corroborated," to which refusal an exception was duly made and entered at the time.

(*i*) The court erred in refusing to give instruction numbered 75, requested by defendants: "You are further instructed that any admissions alleged to have been made by the defendants, testified to by an accomplice, are not in themselves, without the aid of other testimony, sufficient to corroborate the commission of the crime charged in the indictment," to which refusal an exception was duly made and entered at the time.

(*j*) The court erred in refusing to give instruction numbered 78, requested by defendants: "I charge you that if you believe from the evidence that any of the following,—A. J. Taylor, John McGough, C. G. Reay, Young Tai, Manuel Joseph, Leon Duck, or Charles May,—are accomplices, then I charge you that those witnesses whom you find to be accomplices cannot corroborate one another. In other words, accomplices cannot corroborate one another," to which refusal an exception was duly made and entered at the time.

(*k*) The court erred in refusing to give instruction numbered 79, requested by defendants: "I charge you that if you find that A. J. Taylor is an accomplice, then in order to determine whether his evidence is corroborated as required by law, you must eliminate from the case the testimony of said A. J. Taylor, and the evidence of such other witnesses as you find to be accomplices, if any, and then examine the evidence of the other witnesses who are not accomplices under the instructions given you, in order to ascertain if there is any evidence other than that of accomplices, tending directly or immediately to connect the defendants with the commission of the offense. If there is no such evidence, there is no corroboration, although the accomplice may be corroborated in regard to any number of other facts sworn to by him," to which refusal an exception was duly made and entered at the time.

Instructions similar to that set forth in "*k*" were requested in relation to the testimony of John McGough, C. J. Reay, Young Tai, Manuel Joseph, Leon Duck, and Charles May.

(*l*) The court erred in refusing to give instruction numbered 87, requested by defendants: "I charge you that although you should find from the evidence that in March, 1913, the defendants, or one of them, contributed to the bond or defense of one Marney, such act would not be overt act to effectuate the object of the conspiracy, as set forth in the second count of the indictment," to which refusal an exception was duly made and entered at the time.

(*m*) The court erred in refusing to give instruction numbered 92, requested by defendants: "I charge you that the corroboration of an accomplice or co-conspirator by other witnesses as to the commission of an overt act or overt acts is not corroboration of the testimony of such accomplices or co-conspirators as to the existence of the conspiracy," to which refusal an exception was duly made and entered at the time.

(*n*) The court erred in refusing to give instruction numbered 95, requested by defendants: "I charge you that if there is no independent evidence of the existence of a conspiracy in this case, other than that of accomplices, then there is no corroboration as to the existence of the conspiracy, and in this connection I charge you that one co-conspirator or accomplice cannot corroborate another," to which refusal an exception was duly made and entered at the time (Transcript on Appeal, page 75).

Specification (3).

THE COURT ERRED IN ADMITTING IN EVIDENCE, OVER THE OBJECTION OF DEFENDANTS, THE TESTIMONY OF THE WITNESS HEAD, CALLED BY THE GOVERNMENT, AS TO THE FINDING OF $2,000 IN THE HOME OF THE DEFENDANT MILLER.

The court erred in overruling objection to the following questions propounded to the witness Joseph Head, the following having occurred at the trial in this connection:

"Mr. PRESTON:

"Q. Captain Head, what is your first name?
"A. Joseph.
"Q. Are you in the customs service of the United States at the present time?
"A. Yes.
"Q. Whose house was that supposed to be?
"A. Max Miller, a customs guard.
"Q. One of the defendants here?
"A. Yes.
"Q. Who was with you when you made this search?
"A. Inspector Huffaker.
"Q. Tell us what you found in connection with money at that time."

* * * * * * *

"The COURT: When was this indictment filed?

"Mr. PRESTON: In October.

"The COURT: The objection will be overruled.

"Mr. SCHLESINGER: I think, your honor, I will cover the matter with a further objection, that it is not binding upon my defendants, or Mr. McNab's defendant, and it is purely hearsay, and a matter occurring without the province of the defendants."

* * * * * * *

"Mr. SCHLESINGER: Exception.

"A. I found $2,000.00 in a leather purse in Mr. Miller's flat.

"Mr. PRESTON:

"Q. In what particular place in this residence or flat of Miller's did you find the $2,000.00.

"A. It was in the third room from the front door.

"Q. What particular place in the room?

"A. In the bureau."

* * * * * * *

"Mr. SCHLESINGER: I will state the rule, and your honor will read the authority. In the case of the United States *vs.* Williams, there was a Chinese inspector charged with extortion. The amount of his salary was shown at the trial, I think some small amount ($125.00 a month). The Government proved, over the objection of the defendant, that there was found to his credit in the Hibernia Bank, and I believe, also in the German Bank, sums aggregating about $17,000.00; and for the admission of that evidence, the case was reversed."

* * * * * * *

"Mr. SCHLESINGER: No, I did not cover it, your honor, I simply read the authority. I wish to make the objection on the ground it is absolutely irrelevant, incompetent, immaterial, not binding upon any of the defendants, and incompetent for the reasons stated.

"The COURT: Objection overruled.

"Mr. SCHLESINGER: Exception.

"Mr. PRESTON:

"Q. How was this money wrapped?

"Mr. SCHLESINGER: Same objection to this line of evidence already stated, and for the reasons set forth in that Williams case.

"The COURT: Same ruling.

"Mr. SCHLESINGER: Exception.

"A. It was in a leather purse, and the purse wrapped in a newspaper, a part of the San Francisco 'Examiner' of July 2nd, 1913.

"Mr. PRESTON:

"Q. What date did you make this search?

"A. July 3, 1913."

Transcript on Appeal, page 75.

Specification (4).

THE COURT ERRED IN ADMITTING, OVER OBJECTION OF DEFENDANTS, THE TESTIMONY OF THE WITNESS A. J. TAYLOR, CALLED BY THE GOVERNMENT, IT HAVING BEEN PROVED THAT TAYLOR HAD BEEN CONVICTED OF A FELONY AND WAS UNPARDONED.

The court erred in overruling objection to the following questions propounded to the witness A. J. Taylor, the following having occurred at the trial in this connection:

"Mr. PRESTON:

"Q. Your name is A. J. Taylor?

"A. Yes sir.

"Mr. MCNAB: Just a moment. If your honor please, will your honor permit me, for a purpose which may be made evident by the question raised in Thompson *vs.* United States, 202 Fed., to ask a question for the purpose of making an objection to the witness testifying?

"The COURT: Yes, you may.

"Mr. McNAB:

"Q. Mr. Taylor, what is your full name?
"A. Alexander J. Taylor.
"Q. Have you recently been convicted of a felony, in the southern district of California?
"A. Yes, sir.
"Q. And sentenced to what prison?
"A. San Quentin.
"Q. For what period of time?
"A. Two years, sir.
"Q. Have you ever been pardoned?
"A. No, sir.
"Q. You are now an inmate of the State's prison?
"A. Yes, sir.

"Mr. McNAB: If your honor please, I desire to move the exclusion of the testimony of the witness and object to his testifying upon the ground that he is an incompetent witness to testify, he having been convicted of a felony, imprisoned in a Federal penitentiary, which is a State penitentiary, and that he has never been pardoned. The only authority on the question that I have at hand is one which draws an inference but does not positively decide the question, Thompson *vs.* United States, 202 Fed., page 406. I will show it to your honor, if your honor wishes, or I can read it to your honor, just as you desire. (Reads.)

"Mr. PRESTON: I always understood the law to be that that went to his credibility and not to his competency.

"The COURT: The objection is overruled.

"Mr. SCHLESINGER: We take an exception."

The witness Taylor testified as to the truth of the overt act alleged in the indictment, as to the raising of money for the defense of one Marney. The witness was called by telephone to the home of defendant Ellison, where he found the defendants Joseph, Ellison, Varges, and Miller. There the witness raised from the defendants named the sum of $1,000.00 for the bail and $240.00 for attorneys' fees to defend Marney (Transcript on Appeal, page 78).

III.

ARGUMENT.

I.

PART OF A SECTION OF THE OPIUM STATUTE UNDER WHICH THESE PLAINTIFFS IN ERROR WERE CONVICTED—THE ACT OF FEBRUARY 9, 1909, CHAPTER 100, 35 STAT. L., 614—IS UNCONSTITUTIONAL.

Section 2 of the statute claimed to be unconstitutional is as follows. We are concerned only with the part in italics.

> "SEC. 2. (PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.)—That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The contention of plaintiffs in error is as follows: That the portion of the section just quoted in italics is unconstitutional, in that

(*a*) It is an interference with the police power of the State, and

(*b*) It is an exercise of a power not granted Congress by the Constitution.

The first clause of the act, making it a criminal offense against the Federal laws to import or bring, or to assist in the bringing in of opium into the United States, is undoubtedly constitutional, under the commerce clause in the Constitution.

The second part of the section above quoted, and, in particular, the part herein quoted, to wit:

> "* * * or shall *receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation*, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both."

is undoubtedly an assumption by Congress of the police power of the individual State. We have here a statute of Congress punishing a person, whether he be the twentieth person to handle such opium unlawfully imported, and whether it be opium, or any preparation or derivative thereof, and in any shape or form, irrespective of whether or not such person had any part, or assisted at all, in the unlawful importation. In fact, the section here involved limits its own application to opium AFTER IMPORTATION by its own phraseology.

Not only does this section of the statute limit its own application to opium after importation, but the facts in this case come within the rule laid down in *United States vs. Caminata*, 194 Fed., 905, where the court said:

> "The offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by an offender within the territorial limits of the United States. The offense is then com-

pleted, although the opium may not have been landed from a ship or have been carried across the custom lines."

In other words, any person in the city of San Francisco, who has smoking opium in his home in any shape or form, knowing the same to have been unlawfully imported, but having nothing to do with the unlawful importation thereof, is subject to arrest by the Federal Government, although the importation may have taken place twenty years ago.

To take an analogous case: It is now made a criminal offense to import aigrettes into the United States. If this part of the section of the act of Congress in respect to opium is constitutional, then any woman wearing an aigrette, knowing such aigrette to have been unlawfully imported, when imported being immaterial, is subject to arrest by the Federal Government, in spite of the fact that she has taken no part at all in the importation of such aigrettes.

If this act be constitutional, there is no limitation to the power of the Federal Government in its interference with the police power in respect to the morals, the public health, and welfare of the citizens of each and every individual State. Yet, it has been axiomatic and fundamental in our theory of government that the police power in respect to the public health, morals, and social welfare of the citizens of each and every individual State is solely and exclusively for that particular State. This principle of law that the Federal Government cannot interfere with the police power of the individual State is so axiomatic that a long citation of cases is unnecessary, and the mere statement of the rule is sufficient. The only question, therefore, is as to whether or not the statute comes within the purview of this rule, and is not authorized, if it does come, as an exercise of the commerce power of Congress.

That the opium statute is, in part, unconstitutional, has been predetermined in the case of *United States vs. Keller*, 213 U. S., 138; 53 L. Ed., 737. In that case, that part of a statute practically identical in its terms with the section of

the opium statute in question here, was held unconstitutional. The analogy between the two cases is so immediate and direct that we will quote to the court both statutes:

"SEC. 3. That the importation into the United States of alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, OR WHOEVER SHALL KEEP, MAINTAIN, CONTROL, SUPPORT OR HARBOR IN ANY HOUSE OR OTHER PLACE FOR THE PURPOSE OF PROSTITUTION, OR FOR ANY OTHER IMMORAL PURPOSE, ANY ALIEN WOMAN OR GIRL, WITHIN THREE YEARS AFTER SHE SHALL HAVE ENTERED THE UNITED STATES, SHALL, IN EVERY SUCH CASE, BE DEEMED GUILTY OF A FELONY, *and, on conviction thereof, be imprisoned not more than five years, and pay a fine of not more than five thousand dollars;* and any alien woman or girl who shall be found an inmate of a house of prostitution, or practising prostitution, at any time within three years after she shall have entered the United States, *shall be deemed to be unlawfully within the United States, and shall be deported* as provided by sections twenty and twenty-one of this act. (34 Stat. at L., 898, 899, chap. 1134.)

"SEC. 1. That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"SEC. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or *derivative thereof contrary to law*, OR SHALL RECEIVE, CONCEAL, BUY, SELL, OR IN ANY MANNER FACILITATE THE TRANSPORTATION, CONCEALMENT, OR SALE OF SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF AFTER IMPORTATION, KNOWING THE SAME TO HAVE BEEN IMPORTED CONTRARY TO LAW, SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF *shall be forfeited and shall be destroyed and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

In that case, it was held that that section of the act prohibiting the importation of alien females for immoral purposes was constitutional, but that section which makes it a Federal offense to keep, maintain, control, support, or harbor in any house or place for immoral purposes any alien woman after importation, was held to be unconstitutional, as being beyond the power of Congress, and an invasion of the police power of the individual State. To quote from the decision of Chief Justice Brewer:

> "The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and, in terms, that they 'wilfully and knowingly did keep, maintain, control, support, and harbor in their certain house of prostitution' (describing it), 'for the purpose of prostitution, a certain alien woman, to wit, Irene Bodi,' who was, as THEY WELL KNEW, a subject of the King of Hungary, who had entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months." Judgment reversed.
>
> * * * * * * *
>
> "THE ACT CHARGED IS ONLY ONE INCLUDED IN THE GREAT MASS OF PERSONAL DEALINGS WITH ALIENS. IT IS HER OWN CHARACTER AND CONDUCT WHICH DETERMINE THE QUESTION OF EXCLUSION OR REMOVAL. THE ACTS OF OTHERS MAY BE EVIDENCE OF HER BUSINESS AND CHARACTER, BUT IT DOES NOT FOLLOW THAT CONGRESS HAS THE POWER TO PUNISH THOSE WHOSE ACTS FURNISH EVIDENCE FROM WHICH THE GOVERNMENT MAY DETERMINE THE QUESTION OF HER EXPULSION. EVERY POSSIBLE DEALING OF ANY CITIZEN WITH THE ALIEN MAY HAVE MORE OR LESS INDUCED HER COMING. BUT CAN IT BE WITHIN THE POWER OF CONGRESS TO CONTROL ALL THE DEALINGS OF OUR CITIZENS WITH RESIDENT ALIENS? *If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation.*"
>
> * * * * * * *

"That there is a moral consideration in the facts of this case, that the act charged is within the scope of the police power is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken, by Congress, away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power, THEN WE SHOULD BE BROUGHT FACE TO FACE WITH SUCH A CHANGE IN THE INTERNAL CONDITIONS OF THIS COUNTRY AS WAS NEVER DREAMED OF BY THE FRAMERS OF THE CONSTITUTION.

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that *prohibitions and limitations upon these powers should also be fairly and reasonably enforced. Fairbanks vs. United States*, 181 U. S., 283; 45 L. Ed., 862; 21 Sup. Ct. Rep., 648. *To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system.* We should never forget the declaration in *Texas vs. White*, 7 Wall., 700, 725; 19 L. Ed., 227, 237, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'"

No distinction in reason, law, or logic exists between this case and the case at bar, other than that the opium statute makes it essential that the offender know that such opium was unlawfully imported. But this is no valid distinction, as knowledge of the unlawful importation cannot give to Congress powers not granted by the Constitution. Mere knowing or not knowing of an offense against the Government cannot create Federal power, where, without such knowledge, it is clear no such offense could exist.

After the decision in the Keller case, *supra*, Congress amended the section and inserted in two places in the section hereinbefore held unconstitutional the words: "In pursuance of such illegal importation." The amended section has never come before the court for adjudication. But we are not, even here, concerned with whether or not the insertion of the words: "In pursuance of such illegal importation," is enough to avoid the pitfall of unconstitutionality. In the case at bar, there are no words identical or in any wise equivalent in their legal significance to these words: "In pursuance of such illegal importation." By no stretch of the imagination can we read into the act: "In pursuance of such illegal importation"; and by no possible stretch can "knowing the same to have been unlawfully imported" be held to be the equivalent of "in pursuance of such illegal importation."

This question was incidentally touched upon in the case of *United States vs. Krsteff*, 185 Fed., 203, where the court, in commenting upon the power of Congress to punish persons dealing with alien women for immoral purposes, after importation, used the following significant language:

> "It is clear Congress has no such power unless by apt words in the statute THOSE DEALINGS SHALL RELATE AND HAVE CONNECTION WITH SOME MATTER OF IMPORTATION WHICH IS MADE UNLAWFUL BY CONGRESS, AND THE MATTER OF UNLAWFUL IMPORTATION SHALL BE KNOWN TO THE PARTY SOUGHT TO BE CHARGED."

Both cases are analogous in this fundamental principle, that in neither case did the statute require any connection or relationship with the unlawful importation. Thus, by analogous reasoning, since the court held in the Keller case that it was beyond the power of Congress to legislate concerning the morals of alien women within the United States, although such legislation might aid the Federal Government in a power exclusively within its domain, viz: The

immigration of aliens, then this section of the opium statute at issue here, although it might aid the Federal Government in its power to exclude articles of commerce from the United States, must be held unconstitutional in so far as it punishes those found with opium in their possession within any States after importation has ended. As in the Keller case, so here, the fact that it might aid in the exclusion of opium from the United States is insufficient to sanction an invasion of the power reserved to the States and not granted by the commerce clause.

The only other possible distinction between the case at bar and the cases above cited, and particularly the Keller case, is that in one we have Congress legislating as to persons, and in the other as to things, but no logical distinction can rest in such superficial reasoning.

The court, in the case of *Hoke vs. United States*, 227 U. S., 322; 57 L. Ed., 927, in discussing the constitutionality of the statute preventing interstate commerce in women, said, in respect to this distinction:

> "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. The power to regulate each of these is identical, both as to its source and its extent."
>
> * * * * * * *
>
> "Of course, it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects."

It is hardly necessary to emphasize the fact that the opium statute here involved is not an exercise by Congress of its revenue power. We need not dwell upon this at great length.

The opium statute on its very face refutes this argument. There is a direct prohibition against the importation of any and all opium, and then a proviso that opium for medicinal purposes alone may be imported. It is obvious that a revenue measure is never a prohibitionary or an exclusionary measure. To say that a statute excluding any article is a revenue statute is a paradox. A revenue measure has been universally held to be a measure for the purpose of producing revenue and duty. How, therefore, can an act of Congress excluding an article from this country be held to be a revenue measure? Clearly, it is a measure passed under the commerce power of Congress to protect this country from the dangers of allowing such an article in the country.

This point has been decided in the case of *United States vs. Dewitt,* 19 L. Ed., 594; 9 Wall., 41, in which a section of the internal-revenue act, seeking to make it a crime to mix for sale certain oils under a certain degree of temperature, was held unconstitutional, in so far as it operated within the limits of any particular State. In the course of the argument, it was urged that, since the section was found in the internal-revenue act, it was a revenue measure. We quote from the decision of the court as follows:

> "The record shows an indictment against the defendant under the 29th section of the Internal Revenue Act of March 2, 1867 (14 Stat. at L., 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature than 110 degrees Fahrenheit. The offense charged was offering for sale oil made of petroleum of the description specified in the statute, at Detroit, Michigan."
>
> * * * * * * *
>
> "It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the

illuminating oil described in the indictment was in aid and support of the internal-revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

"This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

"THERE IS, INDEED, NO REASON FOR SAYING THAT IT WAS REGARDED BY CONGRESS AS SUCH A MEANS, EXCEPT THAT IT IS FOUND IN AN ACT IMPOSING INTERNAL DUTIES. STANDING BY ITSELF, IT IS PLAINLY A REGULATION OF POLICE."

* * * * * * *

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License cases, 5 How., 504; Passenger cases, 7 How., 283; License Tax cases, 5 Wall., 470; 72 U. S., XVIII, 500, and the cases there cited), that we think it unnecessary to enter again upon the discussion."

In this connection, we would cite the case of *In re* Heff, 197 U. S., 488; 49 L. Ed., 848, without quoting therefrom, as this case will be discussed at length in connection with another point.

In the case of *United States vs. Gould*, number 15239, 25 Fed. Cases, 1375, it was held that an act of Congress which prohibited the keeping of slaves in any particular State, knowing them to have been unlawfully imported, was unconstitutional, although the first section of the act prohibiting the importation of slaves was held constitutional. The case is so analogous and so directly in point that no comment thereon is necessary, and we would call the court's particular attention thereto. We quote at length therefrom:

> "It is settled, by repeated decisions of the Supreme Court, that the commercial power of the General Government extends to and covers (exclusively of the interference of State laws) the importation of either goods or persons, until the *commercial transaction of importation is complete and ended, and no further.* When the goods or persons imported pass out of the possession or control of the importer, his agents and employees, and become mingled with the mass of property or population of a State, they then become subject to the State jurisdiction and laws."
>
> * * * * * * *
>
> "Judge McLean, one of the majority, in the Passenger Cases, 7 How. (48 U. S.), 437, said:
>
> "'When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, *it is subject to the local law;* but, until this shall take place, the merchandise is an import, *and is not subject to the taxing power of the State,* and the same rule applies to passengers. When they leave the ship, and *mingle with the citizens of the States,* they become subject to its laws.'
>
> "This case shows, referring to the Passenger cases, 7 How., 48 U. S., 405, then, that in this respect, the same principle applies to the importation of *both goods and persons;* that is, that until the *commercial*

transaction of the importation is complete and ended, they are subject to the commercial power and laws of the United States; but when the *commercial transaction of importation* is complete and ended, and the goods become mingled with the property, and the persons with the people of a State, *they both, then, become subject to the State jurisdiction* and State laws. It obviously makes no difference that the persons are negroes, and intended by the importer as slaves. Whether they are to be considered as slaves or free, as chattels or persons, the same principle applies to them. The cases referred to show the extent and limit of this power over foreign commerce. It covers and extends to the whole commercial transaction of importation; and, in respect to negroes unlawfully imported as slaves, to their removal out of the country. This is its extent and its limit. In my opinion, it never was the intention of the framers of the Constitution that the several States should surrender to the General Government this power to fix the status, prescribe the rights, and provide for the protection of free negroes, or any other inhabitants of a State. Suppose that a negro, *unlawfully imported, is residing in Alabama, either as a freeman, or wrongfully held as a slave, and that any person should beat, maim or murder such negro in Alabama, what law would be violated, and under what law could the offender be tried and punished? Most unquestionably, the State law.* So, too, if he is wrongfully deprived of his freedom, it is the State law which is violated, and the State law under which the offender is to be punished. *Such an offense has no connection with, or relation to, foreign commerce, and is entirely without and beyond the power given to Congress over any branch of foreign commerce.* * * *

"UNDER THE CONSTRUCTION WHICH I GIVE TO THE LAW, THE INDICTMENT IN THIS CASE IS NOT MAINTAINABLE. IT DOES NOT ALLEGE THAT THE ACCUSED HAD ANY CONNECTION WHATEVER WITH THE *unlawful importation;* NOR DOES IT ALLEGE ANY FACTS FROM WHICH THIS COULD BE LEGALLY INFERRED. IT SIMPLY ALLEGES THAT THE ACCUSED KNOWINGLY HELD AS A SLAVE, IN ALABAMA, A NEGRO WHO HAD

PREVIOUSLY BEEN UNLAWFULLY IMPORTED BY SOME OTHER UNKNOWN PERSON. THIS, I THINK, IS NOT AN INDICTABLE OFFENSE, UNDER THE CONSTITUTIONAL LAWS OF THE UNITED STATES."

It is so elementary that the State has the power, and the exclusive power, to regulate vice and morality, and the public health, and to pass laws for the protection of its citizens with respect thereto, that a long citation of authorities is unnecessary.

In the celebrated License Cases, 5 Howard, 504, the court said:

> "It is possible that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the Constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of the States, whether on land or water, the destruction *itself of what contains* disease and death, and the *longer continuance* of such articles within their limits, or the terms and conditions of their continuance, when conflicting with *their legitimate police, or with their power over internal commerce*, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of State sovereignty, and indispensable to public safety."

To this effect see also the celebrated cases of *Patterson vs. Kentucky*, 97 U. S., 501, and *Mugler vs. State of Kansas*, 123 U. S., 623; 31 L. Ed., 205.

It has been argued, however, that Congress has frequently exercised the power to regulate matter which could only have been done under the general police power, and the validity of these acts, when attacked as beyond the power of Con-

gress, has been upheld. Reference has been made to the lottery acts, the anti-trust acts, the national railway legislation, the safety-appliance act, the quarantine laws, the pure food and drug act, the white slave act, the act regulating mailable articles, and other acts of similar nature. But every one of these acts was upheld under some provision of the Constitution, either that of the Post-Office Department, the commerce clause, the taxing power, or some other grant. Whenever Congress or the head of a department went beyond that power, as by including intrastate carriage with interstate, the acts were declared unconstitutional.

Recognizing that the commerce power of Congress is limited to its particular sphere of interstate and foreign commerce, and that the acts declared constitutional have been held so only in so far as they affected foreign or interstate commerce, in every particular instance where the power of Congress has been exercised so as to indiscriminately affect INTRA as well as INTER state commerce the acts have been held unconstitutional.

> *Trade-mark Cases*, 100 U. S., 82; 25 L. Ed., 550;
> *Illinois Central Ry. Co. vs. McKendree*, 203 U. S., 514; 27 Sup. Ct., 153; 51 L. Ed., 298;
> *Employers' Liability Cases*, 207 U. S., 463; 28 Sup. Ct., 141; 52 L. Ed., 297;
> *Butts vs. Merchants' Trans. Co.*, 230 U. S., 126; 35 Sup. Ct., 964; 57 L. Ed., 1422.

In the celebrated case of *Champion vs. Ames*, 188 U. S., 321; 47 L. Ed., 492, known as the Lottery Case, the court clearly and most emphatically recognizes this contention, namely: That the power to prohibit lotteries extends only so far as interstate commerce is concerned, and cannot interfere with internal affairs of any State. To quote from Judge Harlan, who wrote the opinion:

> "If a State, when considering legislation for the suppression of lotteries within its own limits, may

properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"

* * * * * * *

"BESIDES, CONGRESS, BY THAT ACT, DOES NOT ASSUME TO INTERFERE WITH TRAFFIC OR COMMERCE IN LOTTERY TICKETS CARRIED ON EXCLUSIVELY WITHIN THE LIMITS OF ANY STATE, BUT HAS IN VIEW ONLY COMMERCE OF THAT KIND AMONG THE SEVERAL STATES. IT HAS NOT ASSUMED TO INTERFERE WITH THE COMPLETELY INTERNAL AFFAIRS OF ANY STATE, AND HAS ONLY LEGISLATED IN RESPECT OF A MATTER WHICH CONCERNS THE PEOPLE OF THE UNITED STATES. AS A STATE MAY, FOR THE PURPOSE OF GUARDING THE MORALS OF ITS OWN PEOPLE, FORBID ALL SALES OF LOTTERY TICKETS WITHIN ITS LIMITS, SO CONGRESS, FOR THE PURPOSE OF GUARDING THE PEOPLE OF THE UNITED STATES AGAINST THE 'WIDESPREAD PESTILENCE OF LOTTERIES,' AND TO PROTECT THE COMMERCE WHICH CONCERNS ALL THE STATES, MAY PROHIBIT THE CARRYING OF LOTTERY TICKETS FROM ONE STATE TO ANOTHER."

* * * * * * *

"We decide nothing more in the present case than that the lottery tickets are subjects of traffic among those who choose to sell or buy them; that THE CARRIAGE OF SUCH TICKETS BY INDEPENDENT CARRIERS FROM ONE STATE TO ANOTHER IS THEREFORE INTERSTATE COMMERCE; THAT UNDER ITS POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES, CONGRESS—SUBJECT TO THE LIMITATIONS IMPOSED BY THE CONSTITUTION UPON THE EXERCISE OF THE POWERS GRANTED—HAS PLENARY AUTHORITY OVER SUCH COMMERCE, AND MAY PROHIBIT THE CARRIAGE OF SUCH TICKETS FROM STATE TO STATE; AND THAT LEGISLATION TO THAT END, AND OF THAT CHARACTER, IS NOT INCONSISTENT WITH ANY LIMITATION OR RESTRICTION IMPOSED UPON THE EXERCISE OF THE POWERS GRANTED TO CONGRESS."

To quote again from *Hoke vs. United States, supra,* where the court said:

> "We may illustrate again by the pure food and drugs act. Let an article be debased by adulteration, LET IT BE MISREPRESENTED BY FALSE BRANDING, AND CONGRESS MAY EXERCISE ITS PROHIBITIVE POWER. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT THE MANUFACTURE OF THE ARTICLE IN A STATE. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT IN ALL OF ITS CONDITIONS ITS SALE WITHIN A STATE. BUT CONGRESS MAY PROHIBIT ITS TRANSPORTATION BETWEEN THE STATES, AND BY THAT MEANS DEFEAT THE MOTIVE AND EVILS OF ITS MANUFACTURE."

The case of *In re* Heff, 197 U. S., 488; 49 L. Ed., 848, hereinbefore referred to, is of peculiar significance, in that it holds that, as an exercise of the revenue statute, the power of Congress to tax liquor may be sustained as such, but if an admitted exercise of the police power it is clearly unconstitutional. The court said:

> "We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that State. Under these circumstances, could the conviction of the petitioner in the Federal court of a violation of the act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. AND,

SO FAR AS IT IS AN EXERCISE OF THE POLICE POWER, IT IS WITHIN THE DOMAIN OF STATE JURISDICTION. IT IS TRUE THE NATIONAL GOVERNMENT EXACTS LICENSES AS A CONDITION OF THE SALE OF INTOXICATING LIQUORS, BUT THAT IS SOLELY FOR THE PURPOSE OF REVENUE, AND IS NO ATTEMPTED EXERCISE OF POLICE POWER. A LICENSE FROM THE UNITED STATES DOES NOT GIVE THE LICENSEE AUTHORITY TO SELL LIQUOR IN A STATE WHOSE LAWS FORBID ITS SALE, AND NEITHER DOES A LICENSE FROM A STATE TO SELL LIQUOR ENABLE THE LICENSEE TO SELL WITHOUT PAYING THE TAX AND OBTAINING THE LICENSE REQUIRED BY THE FEDERAL STATUTE. License Cases, 5 How., 504; 12 L. Ed., 256; *McGuire vs. Massachusetts*, 3 Wall., 387; 18 L. Ed., 165; License Tax Cases, 5 Wall., 462; 18 L. Ed., 497. NOW, THE ACT OF 1897 IS NOT A REVENUE STATUTE, BUT PLAINLY A POLICE REGULATION. IT WILL NOT BE DOUBTED THAT AN ACT OF CONGRESS ATTEMPTING, AS A POLICE REGULATION, TO PUNISH THE SALE OF LIQUOR BY ONE CITIZEN OF A STATE TO ANOTHER WITHIN THE TERRITORIAL LIMITS OF THAT STATE, WOULD BE AN INVASION OF THE STATE'S JURISDICTION, AND COULD NOT BE SUSTAINED; AND IT WOULD BE IMMATERIAL WHAT THE ANTECEDENT STATUS OF EITHER BUYER OR SELLER WAS. THERE IS IN THESE POLICE MATTERS NO SUCH THING AS A DIVIDED SOVEREIGNTY. JURISDICTION IS VESTED ENTIRELY IN EITHER THE STATE OR THE NATION, AND NOT DIVIDED BETWEEN THE TWO."

In *New York vs. Miln*, 11 Peters, 102, it was held that a State statute requiring a report from the master of a vessel, of the name, age, place of birth, and last legal settlement of each passenger, is not a regulation of commerce, but of police, and is an exercise of a power which rightfully belongs to the State, as the operation of the law only begins when the rights of Congress to enact a law end. The court said in part:

> "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited

jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

In *Abby Dodge vs. United States*, 223 U. S., 166; 56 L. Ed., 393, the court, in holding that the act of Congress making it unlawful to land, deliver, cure, or offer for sale at any port or place in the United States, sponges taken from the waters of the Gulf of Mexico or the Straits of Florida, could only be constitutional if applied to sponges taken outside the territorial limits of a State, and that any other interpretation would plainly render the statute unconstitutional as an excess of the powers of Congress for the taking of sponges from land under the waters within a State territorial limit is not subject to control of Congress, said:

"As, *by the interpretation* which we have given the statute, its *operation is confined to the landing of sponges taken outside* of the territorial *limits of a State*, and the libel does not so charge—that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a State—it follows that the libel failed to charge an element essential to be alleged and proved in order to establish a violation of the statute. *United States vs. Britton*, 107 U. S., 655, 661, 662; 27 L. Ed., 520, 522, 523; 2 Sup. Ct. Rep., 512 and cases cited."

* * * * * * *

> "In view of the paramount authority of Congress over foreign commerce, through abundance of precaution we say that nothing in this opinion implies a want of power in Congress, when exerting its absolute authority to prohibit the BRINGING OF MERCHANDISE, the subject of such commerce, INTO THE UNITED STATES, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption."

It may be argued that the court might so construe this section of the opium statute as to declare it constitutional. It would seem, however, that, inasmuch as the act applies without qualification both to intra and interstate and foreign commerce and is so interblended in its application to such commerce as to be indivisible, the entire section of the statute here involved must be declared unconstitutional. But even if the court should feel that the act is not *in toto* constitutional, but only partially so, nevertheless this judgment must be reversed, because the evidence clearly shows that the act is unconstitutional as to the alleged offense in the second count of the indictment. It would appear, however, that the section of the act here involved is so closely interwoven in its constitutional and unconstitutional application that the entire section must be declared unconstitutional.

Without quoting at length from the case of *United States vs. Reese*, 92 U. S., 214; 23 L. Ed., 563, and without quoting from the *Trademark Cases*, 100 U. S., 85; 25 L. Ed., 550, and without quoting the case of *El Paso Rd. Co. vs. Gutierrez*, 215 U. S., 87; 54 L. Ed., —; and without quoting the *Employers' Liability Case*, 207 U. S., 463; 52 L. Ed., 297; and without quoting from *Ill. C. R. Rd. Co. vs. McKendree*, 203 U. S., 514; 51 L. Ed., 298, we will cite the case of *Butts vs. Merchant & M. Transp. Co.*, 230 U. S., 126; 51 L. Ed., 1423, in which the civil rights act of 1885, intending to secure equal accommodations to all persons within the jurisdiction of the United States, being invalid in its application

to the States, is held invalid as applied to other places of the United States, such as an American vessel on the high seas, more than a marine league from land, and the District of Columbia, and the territories. The Butts case contains a most thorough and searching analysis of this subject and reviews at great length the cases just mentioned. We would ask the court to note, as being of particular applicability, various quotations from the above-mentioned cases, found in the Butts case. In this case, the court said:

> "So here, to give to the sections in question the effect suggested, it would be necessary to reject or strike out the general words 'within the jurisdiction of the United States,' whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words, restricting their operation to American vessels upon the high seas and to the District of Columbia and the Territories. To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do."

It may be urged that the pure food and drug decisions of the court sustain the constitutionality of the section involved in the case at bar. We are purposed to cite the pure food and drug decisions bearing on the constitutionality of the opium statute, and then to distinguish this case from the case at bar, and to maintain that the *dictas* found in this case have no possible bearing upon the issue here involved. As the original-package doctrine is closely connected with these pure food and drug decisions, we quote here without a lengthy discussion thereof, this doctrine.

It is well to note that, although these pure food and drug decisions concern themselves with interstate commerce, yet the reasoning and logic of the decisions concerning the interstate commerce power of Congress applies with equal force and validity to the foreign power of Congress; that is to say, that a rule of law, in so far as it determines the power of

Congress over commerce, whether it be over interstate or foreign commerce, is governed by the same general principles of constitutional law. The commerce power of Congress under which this statute, if at all sustainable, and the rule be upheld, is determined in its extent by the construction which the court has given to it. The court has universally held that there is a limitation to the commerce power of the Federal Government. It has been universally held, as will be shown by the original-package doctrine, that, in so far as legitimate articles of commerce are concerned, the power of the Federal Government is limited in its exercise over such articles as long as the articles remain in their original package and until they have been commingled with the general mass of the property in the State so as to lose their identity.

In *Vance vs. W. A. Vandercook*, 170 U. S., 438; 42 L. Ed., 1101, the court said, referring to all the authorities on this principle:

> "It is also certain that the settled doctrine is, that the power to ship merchandise from one State into another carries with it, as an incident, THE RIGHT IN THE RECEIVER OF THE GOODS TO SELL THEM IN THE ORIGINAL PACKAGES, ANY STATE REGULATION TO THE CONTRARY NOTWITHSTANDING; that is to say, that the goods received by interstate commerce REMAIN UNDER THE SHELTER OF THE INTERSTATE COMMERCE CLAUSE OF THE CONSTITUTION, UNTIL, BY A SALE IN THE ORIGINAL PACKAGE, THEY HAVE BEEN COMMINGLED WITH THE GENERAL MASS OF PROPERTY IN THE STATE.
>
> "This last proposition, however, whilst generally true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several States to control the incidental right of sale in the original packages of intoxicating liquors shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages, except in conformity to lawful State regulations. In other words, by virtue of the act of Congress, the

> receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the State law in the original packages, because Congress has recognized to the contrary."

The original-package doctrine, as expressed in this case, has been universally followed by the court. To be sure, it may be that this doctrine will be held inapplicable to articles of commerce which are contraband, and which are excluded from this country. However this may be, there is no decision, although *dicta* are found in the pure food and drug decisions, which extends the power of Congress beyond the original-package doctrine.

But assuming, for the purpose of argument, that the court should decide that the foreign and interstate commerce power of Congress as to contraband articles of commerce was all-sweeping and to be exercised within the confines of any particular State, irrespective of the form which the contraband article had taken after reaching its destination in any particular State, nevertheless, this would not affect the question here involved, that is, as to the right of Congress to punish the offender who holds such contraband article within the confines of any particular State after it has left its original package, such person having had no connection or relationship with the unlawful importation. By no process of reasoning can the right to follow such contraband articles, after they have become mixed with the general mass of property in a State, and when no longer in the original package, assuming that Congress has the right so to do, give Congress power to punish a person who holds such article within any particular State after the incorporation of that article in the general mass of property within the State, such person having had no part at all in the unlawful importation. No logical reason can be adduced whereby Congress may be given the right to punish an offender from the right to follow the article *in rem*.

The great point to be emphasized in this case is the fact

that the offender merely holds such article within the State, having, perhaps, had knowledge of its unlawful importation, but in no wise connected with the unlawful importation. The first pure food and drug decision in which this question was raised, is the case of *Hypolite Egg Company vs. United States*, 220 U. S., 45; 55 L. Ed., 365, in which the facts were as follows:

> "Thomas & Clark procured the shipment of the eggs to themselves at Peoria and, upon the receipt of them, placed the shipment in their store-room in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold."

In its decision, the court said:

> "In the case at bar, there was no sale of the articles after they were committed to interstate commerce, NOR WERE THE ORIGINAL PACKAGES BROKEN. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company.
>
> "The statute declares that it is one 'for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein,' and, as we have seen, section 2 makes the shipping of them criminal, and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them and in a sense they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State.

CERTAINLY NOT, WHEN THEY ARE YET IN THE CONDITION IN WHICH THEY WERE TRANSPORTED TO THE STATE, OR, TO USE THE WORDS OF THE STATUTE, WHILE THEY REMAIN 'IN THE ORIGINAL, UNBROKEN PACKAGES.' IN THAT CONDITION THEY CARRY THEIR OWN IDENTIFICATION AS CONTRABAND OF LAW. WHETHER THEY MIGHT BE PURSUED BEYOND THE ORIGINAL PACKAGE WE ARE NOT CALLED UPON TO SAY. THAT FAR THE STATUTE PURSUED THEM, AND, WE THINK, LEGALLY PURSUED THEM, AND TO DEMONSTRATE THIS BUT LITTLE DISCUSSION IS NECESSARY."

But, as stated above, although the dicta as to the unlimited power of Congress over contraband articles, whether interstate or foreign commerce, may in some future decision be upheld by this court to be the law, yet, as previously argued, does it not touch the question here at issue—the right to punish the person merely concealing such article, without any connection or relationship with the unlawful importation being shown?

In the case of *Savage vs. Jones*, 225 U. S., 501; 56 L. Ed., 118, the court in another pure-food decision clearly recognizes the limitation of the commerce power of Congress in respect to adulterated foods in spite of dicta to the contrary therein found. We quote:

> "This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. *The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages.*"
>
> * * * * * * *
>
> "The object of the food and drugs act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this act.' The purpose is to keep such articles 'out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being

transported or when they have reached their destinations, PROVIDED THEY REMAIN UNLOADED, UNSOLD, OR IN ORIGINAL UNBROKEN PACKAGES.' *Hipolite Egg Co. vs. United States*, 220 U. S., 45, 54; 55 L. Ed., 364, 366; 31 Sup. Ct. Rep., 364."

In *McDermott vs. Wisconsin*, 228 U. S., 115; 57 L. Ed., 755, the court held that the State statute which compelled persons within the State to brand and label certain articles in a manner prescribed by the State law and, likewise, compelling such persons to remove the Federal label was an infringement of the commerce power of the Federal Government. The court said:

"That doctrine referring to the original-package doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the nation or State is involved in dealing with property. AND WHERE IT HAS BEEN FOUND NECESSARY TO DECIDE THE BOUNDARY OF FEDERAL AUTHORITY, IT HAS BEEN GENERALLY HELD THAT, WHERE GOODS PREPARED AND PACKED FOR SHIPMENT IN INTERSTATE COMMERCE ARE TRANSPORTED IN SUCH COMMERCE, AND DELIVERED TO THE CONSIGNEE, AND THE PACKAGE BY HIM SEPARATED INTO ITS COMPONENT PARTS, THE POWER OF FEDERAL REGULATION HAS CEASED AND THAT OF THE STATE MAY BE ASSERTED."

* * * * * * *

"For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when section 2 has been violated, the Federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer."

* * * * * * *

> "To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original, unbroken packages.'"

In *Shawnee Milling Company vs. Temple*, 179 Fed., 522, the court said:

> "No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control."

In *Philadelphia Pickling Co. vs. United States*, 202 Fed., 152, the court said:

> "The act has two clearly separate objects (220 U. S., 54; 31 Sup Ct., 364; 55 L. Ed., 364): First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages."

These cases, as stated above, although containing dicta, to the effect that Congress has the right to follow the article, irrespective of its incorporation in the general mass of the property of the country, are not cases in which the facts warrant this rule of law, and are all cases which recognize that Congress has the right to act on interstate commerce only to a certain point. But, assuming that Congress had the right to confiscate the article, it does not necessarily follow, as stated above, that Congress would likewise have the right to punish the offender, for, although the articles are excluded from commerce, the person is not. We are, of course, limiting our reasoning to articles incorporated within the general mass of property within any particular

State, and after interstate commerce has completely ended, and also bearing in mind that we are endeavoring to punish the offender who merely knowingly holds such article after incorporation in the general mass of property within any particular State, having had no connection with the unlawful importation.

Take, for instance, the example of a San Francisco housewife. Adulterated food has been shipped through the mail and is placed upon the shelves of Goldberg, Bowen & Co., of San Francisco, who know it to be adulterated; they sell it to a San Francisco housewife, who likewise knows it to be adulterated; and she uses the food in preparation of the evening meal. Would the United States marshal have the right to come into that woman's home, providing there was a statute to this effect, and arrest her for violating the Federal law because of the fact that she knew that she was using adulterated food? This is what this portion of the opium statute amounts to. From none of these pure-food cases can this conclusion be derived.

The pure-food law itself throws an illuminative light upon the attitude of Congress in respect to its power in the premises. Without quoting verbatim the provisions of the pure-food act of June 30, 1906, 34 Stat. L., 78, section 1 of said pure food and drug act, Congress prohibits the sale or manufacture of adulterated food in the District of Columbia or any Territory of the United States, but does not endeavor to legislate in those respects as to any particular State. In section II and section X of said act Congress enacts that any adulterated food *"which is being transported"* in interstate commerce may be subject to confiscation, and then enacts that, *"having been transported"* and within any particular State and *"remaining unloaded, unsold, or in the original package,"* it is subject to confiscation. Thus it is so palpably obvious that Congress realized that, after the interstate transportation had ended and the food or drug was within the confines of any particular State, there was a limitation upon the power of the Federal authorities and Con-

gress as to that particular food or drug. If this were not true, Congress would have merely stated that these articles "while being transported, or having been transported, through interstate commerce" were subject to the control of the Federal Government. But, as pointed out above, we do not find this broad phrase, but, on the other hand, a fine distinction being made by Congress in the pure food and drug act for the purpose of saving the act from the condemnation of unconstitutionality, such as caused the court to declare the employers' liability act unconstitutional. To reiterate, Congress distinguishes clearly where the goods are in the course of transportation in interstate commerce, and where they have been transported, and admits, by a qualification of its own power, that, where they have been transported and are within any particular State, they are subject to congressional legislation only before incorporation into the general mass of the property of a particular State and before interstate commerce therein has ended. Again, we must emphasize the distinction between the right of Congress to follow an article and to punish the person holding such contraband article of commerce within the particular State.

Thus it would appear that the section of the opium statute here involved is unconstitutional in that it is not authorized by any of the enumerated powers of Congress, nor is it an act seeking to effectuate any of the delegated powers of the Federal Constitution. If the court, as has previously been stated, should feel that the act was constitutional in its applicability to interstate or to foreign commerce, nevertheless the judgment in this case must be reversed, because the overt acts set forth in the second count of the indictment clearly show that all foreign and interstate commerce had ended, and all the acts amount merely to a holding or a concealment within the State of California after all commerce of an interstate or foreign character had ended.

The sole reliance of the Government in this case rests upon knowledge, but we ask, "How may knowledge, or lack of knowledge, create Federal jurisdiction in the premises?"

That this court may feel no hesitancy in declaring this act unconstitutional because of its effect upon the general welfare of the citizens of the State, we note section 307 of the Penal Code of the State of California, which makes it a crime to aid in the acts covered by this Federal statute; in fact, section 307 is much broader in its scope and more inclusive than the Federal statute, and is vigilantly enforced by the State health officers.

> "SEC. 307. PROHIBITING THE SALE OF OPIUM—MISDEMEANOR.—Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations, is sold or given away, to be smoked at such place; and any person who, at such place, sells or gives away any opium, or its said preparations, to be there smoked or otherwise used; and every person who visits or resorts to any such place for the purpose of smoking opium or its said preparations, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment" (Penal Code of California).

We ask the court to declare unconstitutional that portion of the section in italics:

> "SEC. 2. (PENALTY FOR VIOLATION—POSSESSION. PROOF OF GUILT.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall *receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof, after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or*

both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

II.

THE TESTIMONY OF THE WITNESS HEAD AS TO THE FINDING OF $2,000 IN THE HOME OF DEFENDANT MILLER, AN ALLEGED CO-CONSPIRATOR, WAS PREJUDICIAL ERROR.

The plaintiffs in error contend that the testimony of the witness Head (Transcript on Appeal, page 75, Assignment of Error No. 49), in relation to the finding of $2,000 in the home of the defendant Miller, an alleged co-conspirator, was inadmissible.

After being asked the usual preliminary questions, the witness, in reply to the question as to what he found in connection with money at the home of defendant Miller, stated that he found $2,000 in a leather purse in Miller's home.

The plaintiffs in error are charged with the alleged crime of receiving and concealing opium after importation. What possible relevancy or pertinency could the finding of $2,000 in the home of the defendant Miller have upon the guilt or innocence of all these defendants in connection with or in relation to the acts set forth in the indictment? No connection or relation was shown to have existed between this particular $2,000 found in the defendant Miller's home and any of the transactions set forth in the indictment. Had it been proved, or had it appearred in the evidence, that the said $2,000 found in the home of the defendant Miller was derived from any of the transactions set forth in the indictment, or was the result thereof, then, of necessity, would this evidence have been admissible. But here, unsupported by any logical connection or links being shown, the bare

physical fact of the finding of $2,000, or $2, or any sum at all, in the home of the defendant Miller was of no legal significance in the trial of these defendants on the charge of receiving and concealing opium after importation, and it was prejudicial error to admit the same without supporting evidence showing relationship between the sum found in the defendant Miller's home and the acts set forth in the indictment.

The inadmissibility of testimony of this character in criminal cases of this nature has been determined by the court in thecase of United States *vs.* Williams, 168 U. S., 382; 42 L. Ed., 513. The court there held that evidence of any kind or character showing possession of funds by the defendant, who was a Chinese inspector charged with extorting money under color of his office, was inadmissible where there was no offer made at the time of proof by the prosecution that they would show connection between the acts alleged in the indictment and the sums of money introduced in evidence. The court there said:

> "It may be also observed that when the affidavit and bank accounts were offered in evidence, no suggestion was made that the prosecution would at some stage of the trial show that the sums alleged to have been received by the accused under color of his office were part of any sum referred to in the affidavit and bank books.
>
> "The defendant duly excepted to the action of the court in allowing the affidavit and bank books to be read in evidence."
>
> * * * * * * *
>
> "We are of opinion that the affidavit and the bank books were not admissible in evidence against the accused. There was nothing before the jury in respect of the matters referred to in the affidavit except the affidavit itself, and nothing relating to the deposits except that disclosed by the affidavit and the bank books. Taking the case to be as presented by the bill of exceptions, the utmost the evidence tended to show was that the accused had in his possession at

different times certain sums that were deposited by him in bank to his credit or to the credit of his wife. It is to be observed that no sum so deposited corresponded in amount with the sums which he was charged with having extorted under color of his office as Chinese inspector. Upon the face of the transactions referred to, there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly $5,000, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time $100, and at another $85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence was *merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and therefore he must be guilty* of extorting the two sums in question. The present case does not come within the rule of evidence referred to by the learned court. The jury may have been unable to say from the evidence where the defendant obtained the moneys deposited in bank and specified in the bank book, aggregating $4,750 between certain dates. But that did not justify the conclusion that he had, under color of his office as Chinese inspector, extorted $100 upon one occasion and $85 upon another occasion. The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In our judgment, the court, under the circumstances

disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject."

It is clear that the only purpose on the part of the prosecution in introducing this evidence was to show that no man situated as the defendant was and in his environment could honestly have such a sum of money in his possession. What evidence, more prejudicial in its character, could have been admitted in view of the fact that no duty rested upon this defendant to explain the finding of any sum of money in his home, it not being shown that the sum so found was derived from the alleged illegal acts set forth in the indictment?

The natural inference of the jury from the finding of this sum in the home of the defendant Miller, which was unexplained, would be that it was derived from the alleged illegal acts set forth in the indictment. Without any further discussion on this point, and relying upon the authority of United States *vs.* Williams, *supra*, it is contended that this constitutes prejudicial error.

III.

IT APPEARING FROM THE EVIDENCE THAT THE WITNESS A. J. TAYLOR HAD BEEN CONVICTED OF A FELONY AND HAD NEVER BEEN PARDONED, HIS TESTIMONY WAS INADMISSIBLE.

The witness A. J. Taylor testified as to the truth of one of the overt acts alleged in the indictment, to wit, the raising of a sum of money for the defense of one John Marney, indicted for smuggling opium. Proper exception was made to the admission of this testimony. (See Transcript on Appeal, page 21, Assignment of Error No. 51.)

The District Attorney, in seeking to admit the evidence, stated that conviction for a felony did not affect the competency of a witness, but merely went to his credibility.

This question concerns itself with the competency of a witness convicted of a felony in a Federal court. What rule governs the competency of a witness in a criminal trial in a Federal court? It has been universally held that section 858 of the Revised Statutes does not apply to criminal cases tried in a Federal court, it being held that the competency of witnesses is to be determined by the law of the State in which the court is held, as it existed when the laws of the United States were established by the Judiciary Act of 1789.

In the case of United States *vs.* Logan, 144 U. S., 303; 36 L. Ed., 413, the court said:

> "For the reasons above stated, the provision of section 858 of the Revised Statutes, that 'the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty,' has no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the State which was first enacted in 1858, but except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a State."

In the case of *United States vs. Hughes,* 175 Fed., 240, the court said:

> "The first position of defendant's counsel, viz: that the criterion in the admission of evidence is the law as it existed in 1789, is well taken. Section 858, Rev. St. (U. S. Comp. St., 1901, p. 659), after certain provisions not here pertinent, provides:
>
> "'In all other respects the laws of the States in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty.'

"At first view it might seem this included criminal cases; but the contrary has been decided. In United States *vs.* Reid, 12 How., 363; 13 L. Ed., 1023, the witness Clemens was rejected in 1851 in a criminal trial in the circuit court as being incompetent under the law as it existed in Virginia in 1789, although an act passed in 1849 made him competent. This ruling was affirmed by the Supreme Court; Chief Justice Taney (speaking of section 34 of the act of September 24, 1789 (U. S. Comp. St., 1901, p. 581), of which section 858, quoted above, is a substantial re-enactment) saying:

"'The language of this section cannot upon any fair construction be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States and the only one that Congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States. But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. * * * The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the State as it was when the courts of the United States were established by the Judiciary Act of 1789.'"

It is unnecessary to quote a long line of authorities to the effect that the competency of a witness is determined by the State law existing at the time of the establishment of the Federal judiciary. Thus, having determined that the compentency of a witness is established by the common law of the State at the time the Federal judiciary was established, we must go to the common law to see whether or not a felon was a competent witness at the common law. It has

been universally held "a person is incompetent as a witness if he has been convicted of an infamous crime, such as treason, felony, or any of the *crimen falsi*" (40 Cyc., 2205).

In the case of *United States vs. Logan, supra,* the court by inferential reasoning held a felon to be an incompetent witness in a criminal action in a Federal court. In this case the court discusses whether or not the disqualification arising from conviction of a felony at the common law extends beyond the limits of the State in which the judgment was rendered, and further considers the effect of a pardon upon the disqualification arising from the conviction of a felony. If no disqualification arises from a conviction of a felony, why the necessity for a discussion of these questions? To quote from *United States vs. Logan:*

> "At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered. *Wisconsin vs. Pelican Ins. Co.,* 127 U. S., 265 (32:239); Com. *vs.* Green, 17 Mass., 515; Sims *vs.* Sims, 75 N. Y., 463; National Trust Co. *vs.* Gleason, 77 N. Y., 400; Story, Confl. L., sec. 92; 1 Greenl. Ev., sec. 376. It follows that the conviction of Martin in North Carolina did not make him incompetent to testify on the trial of this case.
>
> "The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas, and the full pardon of the governor of the State, although granted after he had served out his term of imprisonment, thenceforth took away all disqualifications as a witness, and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed by the pardon. Boyd *vs.* United States, 142 U. S., 450 (35:1076); United States *vs.* Jones (before Mr. Justice Thompson), 2

Wheel. Crim. Cas., 451, 461; Hunnicutt *vs.* State, 18 Tex. App., 498; Thornton *vs.* State, 20 Tex. App., 519."

See also

Whart. Crim. Ev., sec. 335.
United States *vs.* Wilson, 32 U. S., 7 Pet., 150 (8:640).
Ex parte Wells, 59 U. S., 18 How., 307, 315 (15:421, 425).
Ex parte Garland, 71 U. S., 4 Wall., 333, 380 (18:366, 370); 4 Bl. Com., 402.
Pitner *vs.* State, 23 Tex. App., 374.

In Boyd *vs.* United States, 142 U. S., 453; 35 L. Ed., 1078, the court disqualifies a felon in a criminal action in a Federal court. In that case the court discusses the effect of a pardon upon the incompetency arising from the conviction of a felony.

> "This pardon removed all objections to the competency of Martin Byrd as a witness. The recital in it that the district attorney requested the pardon in order to restore Byrd's competency as a witness in a murder trial to be had in the district court at Little Rock, did not alter the fact that the pardon was, by its terms, 'full and unconditional.' The disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect. The competency as a witness of the person so pardoned was therefore completely restored. United States *vs.* Wilson, 32 U. S., 7 Pet., 150 (8:640); *Ex parte* Wells, 59 U. S., 18 How., 307, 315 (18:421, 425); *Ex parte* Garland, 71 U. S., 4 Wall., 333, 380 (18:366, 370); 4 Bl. Com., 402."

In the case of United States *vs.* Hughes, *supra*, the court makes illuminative remarks upon this subject. We quote:

"There is no doubt that a person convicted of and sentenced for murder, it being an infamous crime, would have been incompetent in the courts of Pennsylvania in 1789. Conceding for the purposes of this case that a conviction and sentence for murder in the second degree would have the same effect, the question then arises: Is not Hull a competent witness by virtue of the 181st section of the act of March 31, 1860 (Purd. Dig., p. 469, par. 357)? The section is as follows:

"'Where any person hath been or shall be convicted of any felony, not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor, as to the felony or misdemeanor whereof such person was so convicted.'

"As to the effect of a pardon in restoring competency there is no doubt. It has always been so held in Pennsylvania (see Hoffman *vs.* Coster, 2 Whart., 468, and Miller on the Competency of Witnesses, pp. 18-19), and in the courts of the United States (see Boyd *vs.* United States, 142 U. S., 450; 12 Sup. Ct., 292; 35 L. Ed., 1077, and Logan *vs.* United States, 144 U. S., 303; 12 Sup. Ct., 617; 36 L. Ed., 429). But is this act in effect a pardon, or is it an enabling statute, passed since 1789, and which comes within the spirit of the court's prohibition in United States *vs.* Reid, *supra*, where it was said:

"'But no law of a State, made since 1789, can affect the mode of proceeding or the rules of evidence in criminal cases.'"

In the case of Thompson *vs.* United States, 202 Fed., 406, the Circuit Court of Appeals for the Ninth Circuit, held that a pardon restored to competency a witness convicted of a felony.

"Altorre was called as a witness for the Government. His testimony was objected to on the ground

that he had been convicted of perjury and sentenced therefor. The witness produced a pardon which he testified he had received and accepted. It was dated March 21, 1911, was signed by the President, and it pardoned Altorre of the crime of perjury, and also of the crime of embezzling the money which the plaintiff in error was charged with concealing. He produced also a pardon of date September 28, 1911, pardoning him of the offense of feloniously stealing, taking and carrying away certain articles of value from a mail bag of the United States, in violation of section 5467. The objection was made to the first pardon that it was not full and complete, and to the second pardon that it was incompetent, irrelevant, and immaterial, and that no proper foundation had been made for its introduction. The bill of exceptions then recites that the objections to the introduction of the pardons were overruled, to which exception was taken, and thereupon the witness was allowed to testify 'in support of the charges set forth in said indictment.' The contention is that it does not appear that the witness was the same person as the person named in the pardons, that the pardons did not pardon any offense but pardoned the offender, and that the pardons failed to set forth the indictment and conviction for the offense committed against the United States.

"(7) There is no merit in any of these objections. The witness, bearing the name of the person named in the pardons, testified that he had received the pardons and accepted them. That was sufficient to identify him.

"(8) The pardons were full and complete, and their effect in law was to remove penalties and disabilities and restore the witness to his full rights. Said the court in *Ex parte* Garland, 4 Wall., 333, 380 (18 L. Ed., 366): 'It makes him, as it were, a new man, and gives him a new credit and capacity.'

"(9) As to the objection that no proper foundation was laid for the introduction of the pardons, it is sufficient to say that the record is silent in that respect, and it will be presumed that it was shown, or that the court took judicial notice that the pardons related to the particular judgments under which

Altorre had been convicted in that court of violation of section 5467 and of perjury, for each pardon contained the date of the conviction and sentence, and named the court in which the judgment was rendered."

The most recent adjudication upon this subject is the case of Maxey *vs.* United States, 207 Fed., 330, in which Circuit Judge Sanborn wrote the opinion. We quote at length therefrom:

"(3) Counsel for Maxey, at the time he objected to the competency of Copeland as a witness, stated that the witness had been convicted of a felony and offered the record of his conviction and sentence. We think it is perfectly fair to assume that the record showed that the crime for which Copeland was convicted and sentenced was a felony, as there seems to have been no objection made upon that ground. We are not confined to this view of the matter, however, as counsel stated that Copeland had been sentenced to 15 months in the penitentiary at Atlanta, Ga., section 335 of the Criminal Code (act March 4, 1909, c. 321; 35 Stat. at L., 1152; U. S. Comp. St. Supp., 1911, p. 1687, reads as follows:

"'All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.'

"We are obliged to assume, therefore, that the crime of which Copeland was convicted and sentenced was a felony.

"(4, 5) And we will now proceed to inquire whether this conviction and sentence rendered Copeland infamous and therefore disqualified him as a witness under the rule of the common law.

"In *Ex parte* Wilson, 114 U. S., 417; 5 Sup. Ct., 935; 29 L. Ed., 89, Mr. Justice Gray, in delivering the opinion of the court holding that an offense punishable by confinement in the penitentiary at hard labor was an infamous offense within the meaning of the Fifth Amendment, said:

"'Mr. William Eden (afterward Lord Auckland) in his Principles of Penal Law, which passed through

three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: "There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." Eden's Principles of Penal Law, c. 7, p. 5.'

"'At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. Pendock *vs.* McKinder, Willes, 655; Gilb. Ev., 143; 2 Hawk., c. 46, p. 102; The King *vs.* Priddle, 1 Leach (4th ed.), 442. The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness, and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses, or the uttering of counterfeit coin or forged securities. 1 Greenl. Ev., p. 373; Utley *vs.* Merrick, 11 Metc. (Mass.), 302; Fox *vs.* Ohio, 5 How., 410, 433, 434 (12 L. Ed., 213). * * *

"'The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment. * * *

"'For more than a century, imprisonment at hard labor in the State prison or penitentiary or other similar institution has been considered an infamous punishment in England and America.'

"In Mackin *vs.* United States, 117 U. S., 348; 6 Sup. Ct., 777; 29 L. Ed., 909, *Ex parte* Wilson, *supra*, was followed.

"Here we have a witness shown to have been convicted and sentenced for a felony to which an infamous punishment was attached. The question now presented for decision is: Was Copeland disqualified as a witness under the rule of common law? The crimes, a conviction and punishment for which would

disqualify a witness at common law, are generally enumerated as follows: Treason, felony and the *crimen falsi*.

"(6) The *crimen falsi* of the common law not only involves the charge of falsehood but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud. Greenl. Ev., p. 373; Wigmore on Evidence, vol. 1, pp. 519, 520. In a note to section 520, Wigmore on Evidence, Mr. Wigmore says:

"'This topic, being practically almost obsolete and destined soon to become entirely so, may be here sufficiently expounded by quoting the words of Professor Greenleaf, which have served to guide our courts in their rulings from 1842.'

"We are not unmindful that the trend of modern opinion, so far as the disqualifications of witnesses are concerned, is toward removing the disqualifications and permitting the jury to weigh the testimony of the witnesses in connection with their character and antecedents; but this court has no power to remove the disqualifications of the common law, the power to do so being with Congress.

"It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The common law prevails until Congress shall decide otherwise."

In the case at bar it appears that the witness A. J. Taylor testified as to having been convicted of a felony, and to having been sentenced to San Quentin for a period of two years. Section 17 of the Penal Code of California defines a felony as follows:

"A felony is a crime which is punishable with death or by imprisonment in the State prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the State prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State prison."

Thus the conviction and sentence to San Quentin for two years made the witness A. J. Taylor a felon under section 17 of the Penal Code of California, and upon authority of the cases hereinbefore quoted he was an incompetent witness.

That it was prejudicial error to admit the testimony of Taylor, he being incompetent as a witness, is obvious when we realize that Taylor testified to the commission of one of the overt acts alleged in the indictment. The jury may have found that this was the only overt act committed, and yet it was alone established by the testimony of Taylor. Thus it appears that the admission of his testimony, he being incompetent, was prejudicial error. To reiterate, as hereinbefore summarized, the witness testified that he had a meeting, together with four or five defendants, at the home of defendant Ellison, where they contributed $1,220 for bail money and attorneys' fees to the defense of Marney. This is the overt act hereinbefore referred in the second count of the indictment (Transcript on Appeal, page 79).

IV.

THE COURT ERRED IN REFUSING TO GIVE VARIOUS INSTRUCTIONS, ALL SEEKING TO ESTABLISH THE RULE OF LAW THAT A CONVICTION CANNOT BE HAD ON THE UNCORROBORATED EVIDENCE OF AN ACCOMPLICE.

A number of instructions were requested on this point, but they all concerned themselves with the fundamental principle as to whether or not an accomplice's testimony must be corroborated in a Federal court in order to sustain a conviction in a criminal case.

It is the contention of the plaintiffs in error that no conviction should be had on the uncorroborated testimony of an accomplice. Particularly is this true in a case such as the case at bar, where there is no evidence other than accomplices' testimony. The Government introduced six or seven

codefendants and established its case upon the testimony of these codefendants. No corroborating evidence of any kind or character was introduced other than this accomplice's testimony, and the court refused to grant the instructions requiring corroboration.

That there is a sound philosophy and logic behind the rule of corroboration in criminal cases is most clearly and convincingly illustrated and demonstrated in the case at bar. In this case, as has been stated above, the Government allows certain of the defendants to plead guilty and then holds over them, until their testimony has been put in evidence, the amount of sentence to which they will be subjected. What more powerful motive could be sought to cause a man to change or to color his testimony, or to fabricate evidence, than his own life and liberty? Thus the reason for the rule requiring corroboration of accomplices' testimony is made evident. Most States require it.

The moral and ethical question involved in this rule of corroboration could be dwelt upon at great length. It is a question of utmost importance in the administration of the Federal criminal law. There has not as yet been an adjudication by the court as to whether or not corroboration of accomplices' testimony will be required. In determining whether or not corroboration is necessary, there should be borne in mind the grave dangers attending the life and liberty of any citizen if this court should determine that no corroboration need be required to an accomplice's testimony. At its best, it is bad evidence, in view of the powerful impulses governing its introduction.

It is contended here that this court has never yet determined whether or not corroboration of accomplices' testimony is required, and that if this court will determine a rule for all Federal courts then it will be argued that corroboration of accomplices' testimony should be required.

It is further contended the credibility of a witness's testimony is to be determined by the law of the jurisdiction in which the trial was had. The question of corroboration

concerns itself with the credibility of a witness, and it is directed solely to the witness's reliability. Assuming that the rule of the jurisdiction where the trial is had governs, we find that the California law requires corroboration of accomplices' testimony. Not only is this true of the statutory law in California, but the rule of corroboration existed under the common law and before the enactment of the codes, and was the rule existing in California at the time California was admitted into the Union.

In section 1111 of the Penal Cole of California we find the statutory enactment requiring corroboration of accomplices' testimony. It is as follows:

> "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

That this was also the common-law rule of the jurisdiction will be noted from the case of People *vs.* Eckett, 16 Cal., 112, decided in 1860, in which the court based an instruction upon the common-law rule as of that date, saying:

> "It is conceded by the Attorney General, and rightly, that the judgment must be reversed.
>
> "1. The defendant was indicted for grand larceny. The court refused to give the following instruction: 'Although the jury may be satisfied that the offense of grand larceny has been committed, yet if they find that the witness, McBillingsly, was an accomplice to the offense, they cannot find the defendant guilty, unless that witness be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. And such corroboration will be insufficient, if it merely shows the commission of the offense, or the circumstances of such commission, but they must connect the defendant with the taking.' This refusal was erroneous (Regina *vs.* Dyke,

> 34 Eng. C. L. R., 381). It is held, by this and other cases cited by the appellant's counsel, that the corroborating evidence to the statements of the accomplice must connect the prisoner with the offense charged."

It will be noted that the instruction was based upon the English common-law rule as of that date, as the codes were not adopted until 1873.

In People *vs.* Ames, 39 Cal., 403, the Supreme Court of California held that to obtain a conviction on the testimony of an accomplice there must be corroborative evidence tending to incriminate the accused aside from and without the aid of the testimony of the accomplice, and the court said:

> "There was, in fact, a total absence of such corroborating evidence as the statute requires, to authorize a conviction on the testimony of an accomplice." (See on this point People *vs.* Eckert, 16 Cal., 110, and for a full collation of the authorities in England and America see 1 Wharton's American Criminal Law, secs. 785 to 798, inclusive.)

It will be seen, therefore, that the court not only relied on the practice act in effect at that time, but also on the English common law. In United States *vs.* Lancaster, 44 Fed., 921, Judge Speer, now of the Circuit Court of Appeals, said:

> "And it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge; and, considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner in any case of felony, upon the sole and uncorroborated testimony of an accomplice."

In United States *vs.* Hinz, 35 Fed., 277, a case arising in the Circuit Court of the Northern District of California, in 1888, Judge Sawyer held that a person could not be convicted of a felony upon the uncorroborated testimony of accomplices, saying:

"Judges in their discretion will advise a jury not to convict for felony upon the testimony of an accomplice alone, and without corroboration, and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judges. And considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner in any case of felony, upon the sole uncorroborated testimony of an accomplice. *Id.*, p. 380. Under the Penal Code of California there is no advisory discretion in the judge, but a conviction on the uncorroborated testimony of an accomplice is absolutely prohibited."

Penal Code, sec. 1111.

"So, also, if two or more accomplices are produced as witnesses, they are deemed not to corroborate each other, but the same rule is applied and the same confirmation required as if there were but one" (1 Greenl. Ev., sec. 381).

In United States *vs.* Lancaster, 44 Fed., 921, the court instructed the jury that

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe it unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement; but, on the other hand, judges, in their discretion, WILL ADVISE A JURY NOT TO CONVICT A FELONY UPON THE TESTIMONY OF AN ACCOMPLICE ALONE, AND WITHOUT CORROBORATION, AND IT IS NOW SO GENERALLY THE PRACTICE TO GIVE THEM SUCH ADVICE THAT ITS OMISSION WOULD BE REGARDED AS AN OMISSION OF DUTY ON THE PART

OF THE JUDGE; AND, CONSIDERING THE RESPECT ALWAYS PAID BY THE JURY TO THIS ADVICE FROM THE BENCH, IT MAY BE REGARDED AS THE SETTLED COURSE OF PRACTICE NOT TO CONVICT A PRISONER IN ANY CASE OF FELONY UPON THE SOLE AND UNCORROBORATED TESTIMONY OF AN ACCOMPLICE. THE JUDGES DO NOT, IN SUCH CASES, WITHDRAW THE CAUSE FROM THE JURY BY POSITIVE DIRECTIONS TO ACQUIT, PUT ONLY ADVISE THEM NOT TO GIVE CREDIT TO THE TESTIMONY. BUT, THOUGH IT IS THE SETTLED PRACTICE IN CASE OF FELONY TO REQUIRE OTHER EVIDENCE IN CORROBORATION OF THAT OF AN ACCOMPLICE, YET, IN REGARD TO THE MANNER AND EXTENT OF THE CORROBORATION REQUIRED, LEARNED JUDGES ARE NOT PERFECTLY AGREED. Some have deemed it sufficient if the witness is confirmed in any material part of the case. Others have required confirmatory evidence that the prisoner actually participated in the offense. It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. I think the true rule is that the corroborative evidence must relate to some portion of the evidence which is material to the issue, and while it need not go to the whole case, yet, in the language of a famous Massachusetts case (Com. *vs.* Holmes, 127 Mass., 424), decited by Chief Justice Gray, it is true that no evidence can be legally competent and sufficient to corroborate an accomplice which does not tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant."

In discussing the question of corroboration in a Federal court, the Circuit Court of Appeals in the case of Keliher *vs.* United States, 193 Fed., 15, said:

"The testimony of Coleman, if accepted by the jury, covered every point necessary to make out a case against the plaintiff in error. What else we have to discuss further relates only to corroboration. The rules as to corroboration are fully stated in Roscoe's Criminal Evidence (13th Eng. Ed., 1908), at pages

110 and 111. So far as the general rules of English criminal law are concerned, there is no better authority than Roscoe to the extent to which he discusses them. At the closing of his observations he cites two decisions, but he adds:

"'It is not necessary that the accomplice should be corroborated in every particular, for then his testimony would be superfluous; but there must be a sufficient amount of confirmation to satisfy the jury of the truth of his story.'

"Plainly this is the result of his summing up of the law, notwithstanding he refers to two decided cases, as we have said. Of course, it is settled that, as this case was tried in the district of Massachusetts, the law of Massachusetts as it stood at the time of the Revolution is ordinarily followed in this district in Federal courts, notwithstanding the United States statutes on this topic do not reach criminal proceedings. It is well known that the rule in Massachusetts has always been as stated by Roscoe. It is not necessary to indulge in a long explanation of this proposition, or to do more than refer to what was said in the opinion of Mr. Justice Morton in behalf of the Supreme Judicial Court in Commonwealth *vs.* Bosworth, 22 Pick., 397, 399, decided in 1839. There it was said that 'it is perfectly clear that it'—that is, the corroboration—'need not extend to the whole testimony, but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others.' The opinion adds, of course, that the corroborative evidence must relate to portions of the testimony material to the issue."

The most recent adjudication upon the subject of corroboration in Federal courts is the case of Sykes *vs.* United States, 204 Fed., 913, where Judge Sanborn held that no conviction could be had upon the uncorroborated testimony of an accomplice. The court in that case likewise held that the rule of law of the jurisdiction in which the case is tried is the rule of law which governs the weight of credibility which should be given to an accomplice's testimony, and

governs as to whether or not corroboration of such testimony must be had before conviction. We quote:

> "The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove that any member of the jury, or any other innocent man did so. Wharton in the ninth edition of his work on Criminal Evidence, in section 442, says:
>
> "'The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the offense were enough, a party, who on the case against him would have no hope of an escape, could, by his mere oath, transfer to another the conviction hanging over himself.'
>
> "A demonstration by reason and authority that this is the just and rational rule may be found in State *vs.* Chyo Chiagk, 92 Mo., 415, 417; 4 S. W., 704. To the same effect are United States *vs.* Ybanez (C. C.), 53 Fed., 536, 540; Commonwealth *vs.* Hayes, 140 Mass., 366, 369; Commonwealth *vs.* Holmes, 127 Mass., 424; 34 Am. Rep., 391; McNeally *vs.* State, 5 Wyo., 59, 68; 36 Pac., 824. In the case last cited an accomplice stated that he and the defendant, McNeally, killed a cow belonging to another, and hid the brands and the hide at a certain place near McNeally's ranch, and he went with the officers where he testified they were hidden, and they there found them. The Supreme Court of Wyoming held that the finding of the brands and the hide where the accomplice testified they were was not corroborative of the testimony of the accomplice as to the guilt of the defendant. It is the settled law of Missouri that evidence that does not identify and connect the accused with the crime charged is not corroborative of the testimony of an accomplice as to matters material to the issue, and that a charge to the jury on this subject is defective and erroneous which does not so state.

State *vs.* Miller, 100 Mo., 606, 622, 623; 13 S. W., 832, 1051; State *vs.* Walker, 98 Mo., 95, 109; 9 S. W., 646; 11 S. W., 1133. The finding of the mail bag and the gunny sack constituted no corroboration of the testimony of Mrs. Callahan in any matter material to the issue, and the record does not contain an iota of other evidence in corroboration thereof."

* * * * * * *

"(1) It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgreen *vs.* United States, 217 U. S., 509, 523, 524; 30 Sup. Ct., 588, 592 (54 L. Ed., 861; 19 Ann. Cas., 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke *vs.* State, 68 Neb., 154; 104 N. W., 154, 158."

The Sykes case refers to the Holmgreen case, which arose in the northern district of California. It is reported in 166 Fed., 440, and later in 217 U. S., 509. In this case the court held to the effect that corroboration must be had of the accomplice's testimony before conviction can be had thereon. The court said:

"It is further alleged that the court erred in refusing to give the following request to charge concerning the testimony of Frank Werta, the alien seeking to be naturalized in the proceeding:

"'I charge you that if you believe the testimony

of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant, and I instruct you that before you can convict said defendant, the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness, or strong corroborating circumstances.'

"It may be doubtful whether Werta can be regarded as an accomplice, as the record tends to show that he had no part in procuring the testimony of Holmgreen, and in nowise induced him to make the oath which was the basis for the proceedings. Be that as it may, the request did not properly state the law, as it assumed that Werta was an accomplice, a conclusion which was controverted, and against which the jury might have found in the light of the testimony. *It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error.*"

Here the court, in most clear and unqualified language, leans toward the rule of corroboration and intimates that had this question been properly raised in the record the court would have required corroboration.

The case of Grimm vs. United States, 156 U. S., 608; 15 Sup. Ct. Rep., 470, exemplifies the leanings of the court toward the rule of corroboration. In this case the court held that a Government decoy was not an accomplice so as to require his corroboration before a person could be convicted on his testimony. We quote:

"The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such Government official. The authorities in sup-

port of this proposition are many and well considered. Among others reference may be made to the cases of *Bates vs. United States*, 10 Fed. Rep., 92; and the authorities collected in a note of Mr. Wharton, on page 97; *United States vs. Moore*, 19 Fed. Rep., 39; *United States vs. Wight*, 38 Fed. Rep., 105; in which the opinion was delivered by Mr. Justice Brown, then district judge, and concurred in by Mr. Justice Jackson, then circuit judge; *United States vs. Dorsey*, 40 Fed. Rep., 752; *Com. vs. Baker*, 155 Mass., 287, in which the court held that one who goes to a house alleged to be kept for illegal gaming, and engages in such gaming himself for the express purpose of appearing as a witness for the Government against the proprietor, is not an accomplice, and the case is not subject to the rule that no conviction should be had on the uncorroborated testimony of an accomplice; *People vs. Noelke*, 94 N. Y., 137; 46 Am. Rep., 128."

In the case of *Reagan vs. United States*, 157 U. S., 301; 39 L. Ed., 712, the court said:

> "The court should be impartial between the Government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the inducements to falsehood on the part of an accomplice are so great. And, if any other witness for the Government is disclosed to have great feeling or large interest against the defendant, the court may, in the interests of justice, call the attention of the jury to the extent of that feeling or interest, as affecting his credibility."
>
> 15 Sup. Ct. Reporter, 613.

In conclusion, it is urged that it is the rule of the Federal courts that corroboration be required of accomplices' testimony in cases of conviction for a felony, and, secondly, that if the rule of the jurisdiction is to be followed the California

rule, both at the common law and under statute, requires corroboration of an accomplice's testimony in cases of conviction for a felony.

In conclusion, it is urged:

1. That the section of the opium statute here involved is unconstitutional.

2. That it was prejudicial error to admit in evidence the finding of money in the home of the defendant Miller without connection being shown that the sum found was derived from the illegal acts set forth in the indictment.

3. That a felon is an incompetent witness in a criminal case in the Federal court.

4. That no conviction in cases of felony can be had upon the uncorroborated testimony of accomplices.

Wherefore, it is asked that judgment be reversed.

Respectfully submitted,

BERT SCHLESINGER,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiffs in Error.

P. S. EHRLICH,
EDW. M. CLEARY,
Of Counsel.

INDEX AND SUMMARY.

	Page.
THE STATUTE INVOLVED	1
GENESIS AND PURPOSE OF THE OPIUM ACT	3–13
(1) The evil against which the Opium Act was directed was Nation-wide, affecting the moral conditions, the health, the physique, and the social welfare of the country. It was a National evil, which the State governments had been found powerless to prevent, to control, or to lessen	3–4
(2) The evil against which the Opium Act was directed was one which the National Government had found itself unable to prevent, control, or lessen by imposition of tariff taxes, even at alleged prohibitory rates. In fact, the higher the rate the more opium was brought into the country through smuggling.	
(3) The evil against which the Opium Act was directed was one which could only be successfully dealt with by international action and by absolute prohibition of importation into the United States, other nations co-operating with legislation to assist in enforcement of suppression of the opium traffic. With this end, the United States suggested the convening of the first International Opium Commission in 1909, and enacted the Opium Act of 1909 in pursuance of this policy, with the expectation of similar action by other nations. To a certain degree, therefore, the Opium Act of 1909 was passed in fulfillment of an international obligation	4–6 6–11

74251—15——1

Page.

(4) In accord with convention adopted at the first International Opium Commission in 1909, and at the second International Opium Commission in 1912, Congress enacted the Opium Act of January 17, 1914, which, while extending and perfecting the prior Act of 1909, was substantially the same in principle. This Act of 1914 was enacted in direct fulfillment of an international obligation. The two acts should therefore be, to a certain extent, considered together and as parts of a single scheme of legislation in passing upon their constitutionality 11–13

THE ARGUMENT 13–80

ANSWER TO POINT I OF PLAINTIFFS IN ERROR'S BRIEF (pp. 16–45) 13–54

I. Section 2 of the Opium-Exclusion Act of 1909 is drafted from and is practically word for word identical with section 3082 of the Revised Statutes, which has been frequently considered by this court and which has always been accepted without question as constitutional 13–25

II. The Opium-Exclusion Act of 1909 is within the power conferred upon Congress by Article I, section 8, of the Constitution to regulate commerce with foreign nations 25–36

III. Congress having power to make criminal the importation of an article may provide for the punishment as an accessory of one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of an article after importation, knowing the same to have been imported contrary to law 36–42

IV. Cases urged by Plaintiffs in Error to conflict with the above contentions 42–54

Page.

ANSWER TO POINT IV OF PLAINTIFFS IN ERROR'S BRIEF (pp. 58–69) 54–65

V. The Court properly refused the requested instructions, which assumed as matter of law that it is absolutely necessary for the testimony of accomplices to be corroborated, because—

First. There is no such common-law rule, and the rules of evidence under the common law control in criminal actions in Federal Courts 54–58

Second. The trial court properly advised the jury 58–64

Third. There is ample corroborative evidence 64–65

ANSWER TO POINT III OF PLAINTIFFS IN ERROR'S BRIEF (pp. 48–58) 66–67

VI. The objection to admission of Taylor's testimony was properly overruled; and in any event it was not prejudicial 66–67

First. The disqualification of the witness was not properly proved 66–69

Second. Conviction of smuggling does not disqualify a witness 70–74

Third. The testimony was not prejudicial to defendants 74–76

Fourth. Plaintiffs in error have admitted that the testimony was immaterial 76–77

ANSWER TO POINT II OF PLAINTIFFS IN ERROR'S BRIEF (pp. 45–48) 77–80

VII. The Court did not err in admitting the testimony of witness Head as to the finding of $2,000 in the home of the defendant Miller 77–80

First. The testimony was relevant 77–80

Second. The testimony was not prejudicial 80

CONCLUSION 80

AUTHORITIES CITED.

	Page.
Ahearn v. *United States* (1907), 158 Fed. 606	57
Amado v. *United States* (1904), 195 U. S. 172	17
Atwood & Robbins Case (1788?), 1 Leach, C. L. 464	55
Bacon, Abr., v. 9, "*Smuggling*"	70
B. & O. R. R. Co. v. *Int. Comm. Com.* (1911), 221 U. S. 619	31
Bartholomew v. *People* (1822), 104 Ill. 601	69
Benson v. *U. S.* (1892), 146 U. S. 337	71
Blackstone, Com., Book 4, p. 155	70
Boyd v. *State* (1894), 94 Tenn. 508	69
Brown v. *Maryland* (1827), 12 Wheat. 419	33, 50
Buttfield v. *Stranahan* (1904), 192 U. S. 470	25, 30
Castellano v. *Peillon* (1824), 2 Martin, N. S. (La.) 468	69
Clark et al. v. *Protection Ins. Co.* (1840), 1 Story 109	19
Coleman v. *Tennessee* (1878), 97 U. S. 509	54
Com. v. *Bishop* (1896), 165 Mass. 148	57
Com. v. *Green* (1822), 17 Mass. 512	67
Com. v. *Holmes* (1879), 127 Mass. 424	57
Cooper, etc., v. *Coates & Co.* (1874), 21 Wall. 110	76
Dodge v. *United States* (1904), 131 Fed. 849	18
Dunbar v. *United States* (1895), 156 U. S. 185	16
Durham & Crowder Case (1787), 1 Leach, C. L. 478	56
Ex parte Hoyt (1839), 13 Pet. 279	19
Ex parte Wilson (1884), 114 U. S. 422	71
Fox v. *State of Ohio* (1847), 5 How. 410	53
Friedenstein v. *United States* (1888), 125 U. S. 224	18
Grafton v. *United States* (1907), 206 U. S. 333	54
Greenleaf, Ev. (1899), v. 1, sec. 380, p. 519; sec. 373	55, 69
Hale, Pleas of the Crown	37
Hanley v. *United States* (1903), 123 Fed. 849	57, 69
Hawkins, Pleas of the Crown	36
Henderson Bridge Co. v. *Henderson City* (1899), 173 U. S. 592	33
Hipolite Egg Co. v. *United States* (1911), 220 U. S. 45	30, 51

	Page.
Hoke v. *United States* (1913), 227 U. S. 308	53
Holmgren v. *United States* (1910), 217 U. S. 523	60
Keck v. *United States* (1899), 172 U. S. 434	17
Keliher v. *United States* (1912), 193 Fed. 23	73
Keller v. *United States* (1909), 213 U. S. 138	44–47
Lawton v. *Steele* (1894), 152 U. S. 133	30
Lewis Publishing Co. v. *Morgan* (1913), 229 U. S. 314	31
Logan v. *United States* (1891), 144 U. S. 263	57
Lottery Case (1903), 188 U. S. 321	26
McDermott v. *Wisconsin* (1913), 228 U. S. 115	31, 51
Mammoth Min. Co. v. *Salt Lake Machine Co.* (1894), 151 U. S. 447	76
Moore v. *State of Illinois* (1852), 14 How. 13	54
Motes v. *United States* (1899), 178 U. S. 458	76
Nicol v. *Ames* (1898), 173 U. S. 509	32
North American Cold Storage Co v. *Chicago* (1908), 211 U. S. 306	30
One Pearl Chain v. *United States* (1903), 123 Fed. 371	18
Opinions Attorneys General, vol. 29, p. 603 (1912)	30
People v. *Eckett* (1860), 16 Cal. 112	58
People v. *Herrick* (N. Y., 1816), 7 Am. Dec. 364	69
Phillips, Ev. (1859), v. 1, p. 110	55
Reagan v. *United States* (1895), 157 U. S. 301	17, 60, 73
Reg. v. *Boyes* (1859), 1 B. & S. R., 309	56
Reg. v. *Mullins* (1848), 7 St. Tr. 1087	56
Reg. v. *Stubbs* (1855), Dearsley, C. C., 555	56
Rex v. *Castell Careinion* (1806), 8 East. T. R. 77	69
Rex v. *Jones* (1809), 2 Camp. N. P. R., 131; 31 How. St. Tr. 251	56
Richardson v. *United States* (1910), 181 Fed. 1	57, 60
Rogers v. *United States* (1910), 180 Fed. 54	17
Russell, Crimes (1910), v. 1, p. 371	70
Sentell v. *New Orleans, etc., R. Co.* (1897), 166 U. S. 698	30
Starkie, Ev. (1837), v. 2, p. 12	55
State v. *Green* (1896), 48 S. C. 136	57
Steinham v. *U. S.* (1840?), 2 Paine, 168	57, 59
Stockwell v. *United States* (1871), 13 Wall. 531	17, 19, 20, 31, 42
Sykes v. *United States* (1913), 204 Fed. 913	61

Page.
Taylor, Ev. (1858), v. 2, p. 796 55
The Abby Dodge (1912), 223 U. S. 166 25
The Ariel and Cargo (1867), 1 Haskell, 65 17
Underhill, Crim. Ev. (1910), sec. 73, p. 127; sec. 206, p. 379 55, 68
United States v. *Ah Fook* (1910), 183 Fed. 33 17
United States v. *A Lot of Jewelry* (1875), 13 Blatch. 60 18
United States v. *A Lot of Jewelry* (1894), 59 Fed. 684 17
United States v. *A Lot of Precious Stones* (1905), 134 Fed. 61 17
United States v. *Biebusch* (1880), 1 McCrary, 42 69
United States v. *Block* (1877), 4 Sawy. 211 73
United States v. *Caminata* (1912), 194 Fed. 903 28
United States v. *Chesbrough* (1910), 176 Fed. 778 17
United States v. *Claflin* (1878), 97 U. S. 546 18, 32
United States v. *Claflin* (1878), 13 Blatch. 178 16, 41
United States v. *Coombs* (1838), 12 Pet. 72 34
United States v. *De Witt* (1873), 9 Wall. 41 32
United States v. *Farnsworth* (1815), 1 Mason, 1 19
United States v. *Fifty-three Boxes, etc.* (1870), 2 Bond. 354 16
United States v. *Fifty Waltham Watch Movements* (1905), 139 Fed. 291 18
United States v. *Five Pieces of Tapestry* (1902), 114 Fed. 496 18
United States v. *Giuliani* (1906), 147 Fed. 594 57, 60
United States v. *Gould* (1860), 25 Fed. Cas. 1375, Case No. 15239 43
United States v. *Hinz* (1888), 35 Fed. 272 60
United States v. *Jordan* (1876), 2 Lowell, 537 17
United States v. *Kee Ho* (1887), 33 Fed. 333 16
United States v. *Krsteff* (1911), 185 Fed. 201 47
United States v. *Lancaster* (1890), 44 Fed. 885 60
United States v. *Landsberg* (1870), 14 Fed. Cas No. 8041 16
United States v. *Marigold* (1850), 9 How. 560 25, 26, 53
United States v. *Merriam* (1871), Fed. Cas. No. 15759. 17
United States v. *Ninety Demijohns, etc.* (1880), 8 Fed. 485 17

Page.

United States v. *Ninety-five Boxes, etc.* (1874), Fed. Cas. No. 15891 17
United States v. *One Pearl Chain* (1905), 139 Fed. 510, 513 18
United States v. *One Pearl Necklace* (1900), 105 Fed. 357 18
United States v. *One Pearl Necklace* (1901), 111 Fed. 164 18
United States v. *Portale* (1914), 235 U. S. 27 48
United States v. *Reid* (1851), 12 How. 360 57
United States v. *Sauer* (1896), 73 Fed. 671 ..... 16, 29
United States v. *Shepard* (1870), 1 Abb. 431 73
United States v. *Sims* (1907), 161 Fed. 1009 ..... 69, 73
United States v. *646 Half Boxes of Figs* (1908), 164 Fed. 778 18
United States v. *The William* (1808), 28 Fed. Cas. 614, Case No. 16700 26
United States v. *Thomas* (1870), 4 Ben. 370 ..... 16, 22
Vance v. *Vandercook* (1897), 170 U. S. 438 50
Von Cotzhausen v. *Nazro* (1879), 15 Fed. 891, Affd. in (1882) 107 U. S. 215 18
Walsh v. *United States* (1847), Fed. Cas. No. 17116 19
Wigmore, Ev. (1904), v. 3, sec. 2056; v. 1, sec. 519 ..... 54, 58, 71
Williams v. *U. S.* (1897), 168 U. S. 382 78

STATUTES.

	Page.
1 Stat. 678	18
1 Stat. 644	24
2 Stat. 469	24
3 Stat. 781	19
4 Stat. 566	24
4 Stat. 168	24
4 Stat. 590	4
4 Stat. 629	4
5 Stat. 558	4
9 Stat. 47	4
11 Stat. 192	4
12 Stat. 182	4
12 Stat. 292	4
12 Stat. 347	24
13 Stat. 212	4
14 Stat. 179	15, 73
14 Stat. 1	24
14 Stat. 3	24
14 Stat. 328	24
16 Stat. 263	24
16 Stat. 580	24
16 Stat. 265	4
17 Stat. 599	24
22 Stat. 1495	4
22 Stat. 828	5
22 Stat. 451	24
22 Stat. 489	24

	Page.
24 Stat. 434	25
24 Stat. 476	25
26 Stat. 1107	23
26 Stat. 608	4
28 Stat. 542	4
28 Stat. 510	4
29 Stat. 695	4
30 Stat. 153	4
30 Stat. 207	23
32 Stat. 33	4
34 Stat. 898	46, 48
35 Stat. 614	2, 10, 14
36 Stat. 264	46, 48
36 Stat. 14	4
37 Stat. 83	23
37 Stat. 241	23
37 Stat. 315	23
37 Stat. 507	23
38 Stat. 195	23
38 Stat. 148	23
38 Stat. 194	23
38 Stat. 117	4
Act of Jan. 17, 1914—Public No. 46, 63d Cong., 1st sess	13
Act of Jan. 17, 1914—Public No. 4, 63d Cong., 1st sess., 2d sess	13
Act of Dec. 17, 1914—Public No. 223, 63d Cong., 2d sess	13
Revised Statutes, sec. 3082	14, 31, 41, 73

DOCUMENTS.

Page.

Congressional Record, vol. 43, part 2, pp. 1681 et seq. 10, 14, 27, 28
House Doc. No. 926, 60th Cong., 1st sess..... 8
House Report No. 23, 63d Cong., 1st sess..... 13
House Report No. 24, 63d Cong., 1st sess..... 13
Senate Doc. No. 377, 61st Cong., 2d sess..... 3, 6, 7, 29
Senate Doc. No. 733, 62d Cong., 2d sess..... 11, 12
Senate Report No. 132, 63d Cong., 1st sess..... 13
Senate bill No. 1158, 48th Cong., 1st sess..... 5
Senate bill. No. 3044, 49th Cong., 2d sess..... 5–6

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

J. J. BROLAN ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES.
No. 645.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

THE STATUTE INVOLVED.

The decision of this case will affect not only the particular statute in question—the Opium Exclusion Act—but also many other statutes prohibiting imports of articles destructive of the National welfare. The case is, therefore, of deep consequence to the health and morals of the American people.

The imposing array of 53 assignments of error filed by the plaintiffs in error has in its progress from the district court to its review by this Court dwindled to the four points set forth on the last page of the brief of the plaintiffs in error. The four points being the only ones argued therein, no

other specific assignments of error are considered in this brief.

The statute involved is the Opium Exclusion Act of February 9, 1909, c. 100 (35 Stat., 614), section 2:

> That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

The only portion of this section claimed to be unconstitutional by the plaintiffs in error is italicized *supra*, and the grounds of their opposition as stated in their brief (pp. 16, 17), are as follows:

> (*a*) It is an interference with the police power of the State, and
>
> (*b*) It is an exercise of a power not granted Congress by the Constitution.

GENESIS AND PURPOSE OF THE OPIUM ACT.

(1) The evil against which the Opium Act was directed was Nation-wide, affecting the moral conditions, the health, the physique, and the social welfare of the country. It was a National evil, which the State governments had been found powerless to prevent, to control, or to lessen.

The moral and physical disasters attendant upon the growth of the opium habit are too well recognized to need lengthy discussion. The report rendered to Congress January 1, 1910, by the American delegates on the International Opium Commission will serve to illustrate the conditions which gave rise to the Act. (Senate Doc. No. 377, 61st Cong., 2d sess., pp. 34, 44, 45):

> * * * it is an undoubted fact that about 1860 the opium-smoking habit began to spread from our Pacific coast over the Rockies and through our middle and eastern centers of population. Primary infection was from the Chinese, but it soon spread from white to white and from black to black. Nearly every State in the Union at once awoke to the peril of this vice, and State and municipal laws have been passed from time to time to counteract the evil; but it has come out quite clearly by investigation that it was impossible to effectually enforce State and municipal ordinances against opium smoking or the opening of opium divans in the face of the fact that the Federal Government by tariff laws permitted the importation and by excise laws permitted the manufacture of the drug (p. 45).

(2) The evil against which the Opium Act was directed was one which the National Government had found itself unable to prevent, control, or lessen by imposition of tariff taxes, even at alleged prohibitory rates. In fact, the higher the rate, the more opium was brought into the country through smuggling.

Opium in the tariff acts:

The tariff act of July 14, 1832 (4 Stat. 590), placed opium on the free list. The act of March 2, 1833 (4 Stat. 629), placed opium on the free list from and after June 30, 1842. The act of August 30, 1842 (5 Stat. 558), imposed a duty of 75 cents per pound, and subsequent tariff acts imposed duties ranging from 15 per cent ad valorem to $1, $2.50, and $6 per pound; July 30, 1846 (9 Stat. 47); March 3, 1857 (11 Stat. 192); March 2, 1861 (12 Stat. 182); August 5, 1861 (12 Stat. 292); June 30, 1864 (13 Stat. 212); July 14, 1870 (16 Stat. 265); March 3, 1883 (22 Stat. 1495).

The act of October 1, 1890 (26 Stat. 608), placed crude opium on the free list, but imposed a duty of $12 per pound on smoking opium. Subsequent acts—August 27, 1894 (28 Stat. 510, 542); July 24, 1897 (30 Stat. 153); August 5, 1909 (36 Stat. 14); October 3, 1913 (38 Stat. 117)—imposed duties varying from $1 to $6 per pound. The act of August 27, 1894 (28 Stat. 542), however, placed opium containing 9 per cent or over of morphia on the free list.

See also Act of March 3, 1897 (29 Stat. 695); Act of February 14, 1902 (32 Stat. 33).

Opium treaty:

The treaty of November 27, 1880, article II, between the United States and China (22 Stats. 828) contained the following provision:

> The Governments of China and of the United States mutually agree and undertake that Chinese subjects shall not be permitted to import opium into any of the ports of the United States; and citizens of the United States shall not be permitted to import opium into any of the open ports of China; to transport it from one open port to any other open port; or to buy and sell opium in any of the open ports of China. This absolute prohibition, which extends to vessels owned by the citizens or subjects of either power, to foreign vessels employed by them, or to vessels owned by the citizens or subjects of either power and employed by other persons for the transportation of opium, shall be enforced by appropriate legislation on the part of China and the United States; and the benefits of the favored-nation clause in existing treaties shall not be claimed by the citizens or subjects of either power as against the provisions of this article.

The first bill to provide for the execution of the provisions of the above treaty was introduced January 18, 1884, in the Senate (48th Cong., 1st sess., S. bill No. 1158). The bill passed the Senate, but failed in the House. The second bill to provide for the execution of the provisions of the treaty was introduced in the Senate (49th Cong., 2d sess., S. bill

No. 3044) and became the law of February 23, 1887 (24 Stats., 409).

The result of the provisions of the treaty of 1880 with China was that, though Chinese subjects resident in the United States were prohibited the importation of opium, American citizens have imported the drug in a form prepared for smoking, and have immediately handed it over to Chinese subjects, who have distributed it throughout the country, not only to Chinese but to all who have become addicted to the opium habit. (Report of Commission, Senate Doc. No. 377, 61st Cong., 2d sess.)

The result of the attempt to control imports of opium by imposing high tariff duties was simply to increase smuggling, and there was not only no diminution but a great increase in the introduction of opium into the United States. (See Senate Doc., *supra*, No. 377, pp. 30–45.)

> Whatever errors must be allowed for in these calculations, there has nevertheless been a per cent increase in our importations of smoking opium out of all proportion to our per cent increase in total population; this, too, of a form of opium the entry of which should never have been legalized (p. 39).

(3) The evil against which the Opium Act was directed was one which could only be successfully dealt with by international action, and by absolute prohibition of importation into the United States, other nations co-operating with legislation to assist in enforcement of suppression of the opium traffic. With this end, the United States suggested the

convening of the first International Opium Commission in 1909, and enacted the Opium Act of 1909 in pursuance of this policy, with the expectation of similar action by other nations. To a certain degree, therefore, the Opium Act of 1909 was passed in fulfillment of an international obligation.

From 1903 to 1906 appeals were made to the President and the Secretary of State for the initiation of an international conference on the opium problem and at the suggestion of the United States an international commission was convened (as stated in the Report of Jan. 1, 1910, of the American delegates on the International Opium Commission, Senate Doc. 377, 61st Cong., 2d sess., p. 64):

> The powers originally invited to the commission were those having territorial possessions in the Far East, namely, China, France, Germany, Great Britain, Japan, the Netherlands, Portugal, Russia, and Siam. Further consideration of the subject showed that the opium question could not be thoroughly studied and reported unless the large opium-producing countries were represented in the commission, even though they had no territorial possessions in the Far East. Therefore, an invitation was extended to Persia and Turkey, and finally, because of their large commercial interests in the Far East, to Austria-Hungary and Italy. It followed that, including the United States, thirteen countries sent delegates to the International Opium Commission. Turkey was not represented,

owing to the political upheaval that had just occurred in that country.

On May 11, 1908, President Roosevelt transmitted to Congress a letter of recommendation from Secretary of State Root (House Doc. No. 926, 60th Cong., 1st sess.) recommending an appropriation for the participation of the United States in the Joint International Commission on January 1, 1909. This letter termed it an investigation of a "subject so important to humanity."

The President's message stated:

> While the policy of the United States has been clear and positive to prevent American citizens from having any part in imposing the evils that follow the use of opium upon the people of China and in using all possible means to prevent the use of opium in the Philippines, there is reason to believe that sufficient attention has not been given to prevent the importation of the drug into the United States. The importation of opium into the United States in the year ending June 30, 1907, amounted to 728,530 pounds. While the international investigation now proposed relates to opium in the Far East, an incidental advantage of the investigation may be to point out the necessity and the best method of restricting the use of opium in the United States.
>
> The commercial aspect of the subject involves such complicated and widespread trade relations that an effective treatment of it seems impossible unless it be by the con-

current action of the great commercial nations, together with those peoples of the Orient among whom the abuse is most prevalent.

Congress by Act of May 27, 1908, appropriated $20,000 for the expenses of the American delegates, and Dr. Hamilton Wright, of Washington, D. C., Bishop Charles H. Brent, of the Philippine Islands, and Dr. Charles D. Tenney, secretary to the American Legation in China, were appointed commissioners. The meeting of the Commission was to have been held on January 1, 1909, but owing to the recent death of the Emperor and Empress Dowager of China was postponed until February 1, 1909. The Commission adjourned February 26, 1909, but meanwhile (as stated in the Report of the American delegates, pp. 51–52):

> While the diplomatic correspondence proceeded it became apparent to the Department of State that there was a large misuse of opium in the continental United States. When this had been sufficiently demonstrated by the opium commission, it became the bounden duty of our Government to take some steps to clear up the home problem before the American delegates to the International Opium Commission should be brought face to face with the delegations of the other powers. Otherwise the American people stood to be accused of living in a glass house that no doubt would have been shattered on their heads.
>
> Based on investigations made in the United States during the summer and autumn of 1908,

> a letter was addressed to the department on October 26, 1908, calling attention to the two main facts that had been disclosed: First, that the Federal Government was legalizing the importation and manufacture of smoking opium in spite of the fact that nearly every State and municipality in the Union had a law against its sale and use, and that it was absolutely necessary that this anomalous position should be cleared by prohibitory legislation before the meeting of the International Commission at Shanghai; second, that State and municipal laws would continue to be to a large extent ineffective as long as there was an unrestricted importation of crude or medicinal opium, its manufacture into morphine, and the uncontrolled distribution of both drugs in interstate commerce. * * *

For the above reasons and as "an urgent and necessary act if the American Government was to appear at Shanghai with fairly clean hands" (p. 54), as a result of the researches and recommendations mentioned above, a bill was drafted based on the investigations of the Opium Commission, aimed absolutely to prohibit the importation of smoking opium and entitled "An act to prohibit the importation and use of opium for other than medicinal purposes." This bill, which ultimately became the Act of February 9, 1909 (35 Stat. 614), being the Act now in question, was explained by Mr. Payne, who stated in reporting it from the Committee on Ways and Means in the House of Representatives, as follows (Cong. Rec., vol. 43, pt. 2, pp. 1681–1683):

The object of the bill is to prohibit the importation of opium prepared for smoking, or smoking opium. The language goes to the importation of all opium, with a proviso that opium for medicinal purposes may be imported under rules and regulations prescribed by the Secretary of the Treasury and subject to the duties provided by law. The second section is redrafted from section 3082 of the Revised Statutes, which provides punishment for knowingly or fraudulently disobeying the laws in reference to the importation of articles in general, applying that section to the importation of opium into the United States. That law was passed in 1799, and was reenacted and amended in 1866 and in 1876, and has been frequently construed by the courts and its meaning fully ascertained and its constitutionality also upheld.

(4) In accord with conventions adopted at the first International Opium Commission in 1909, and at the second International Opium Commission in 1912, Congress enacted the Opium Act of January 17, 1914, which, while extending and perfecting the prior Act of 1909, was substantially the same in principle. This Act of 1914 was enacted in direct fulfillment of an international obligation. The two acts should therefore be, to a certain extent, considered together and as parts of a single scheme of legislation, in passing upon their constitutionality.

A second International Opium Conference was held at The Hague December 1, 1911, to January 23, 1912. (See message of President Taft May 31, 1912, Senate Doc. No. 733, 62d Cong., 2d sess.) It was called at the initiative of the United States by letter from the

State Department, September 1, 1909, and was participated in by the United States, China, France, Germany, Great Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam. A convention was adopted signed by all the powers, regulating the whole subject of import, export, manufacture, etc., of crude and prepared opium. Of this, the Report of the American delegates (Senate Doc. No. 733, *supra*, p. 19) says:

> Chapter II of the convention is of striking importance, as it provides for the obliteration in a short time of the manufacture, exportation, importation, and use of opium for smoking purposes, and, in the meantime, for the confining of such manufacture and use to territories where such manufacture and use now obtain by totally forbidding the export of this form of opium to countries which have prohibited its entry and use or to countries which propose in the future to prohibit its entry and use.
>
> The first paragraph of Chapter II defines the substance known as opium prepared for smoking, and by article 6 the contracting powers pledge themselves to take measures for the control, and ultimately effective suppression of the manufacture, domestic traffic in, and use of this form of opium.
>
> When it is recalled that not 10 years ago there was a large and influential body of public officials and others here and abroad who saw no harm, economic, moral, or otherwise, to oriental peoples in opium smoking, the im-

portance of article 6 will be recognized. It marks the right-about of such opinion, and a recognition by the Governments and peoples concerned that the opium-smoking vice is generally degrading beyond all benefits to revenue that may accrue from the manufacture, importation, exportation, and use of this form of opium, and a determination on the part of those Governments and peoples to bring the vice to a speedy conclusion.

By article 7 the contracting powers pledge themselves to prohibit not only the importation of the smokable form of opium, but also its exportation—thus conforming to one of the principles embraced by the opium-exclusion act of February 9, 1909, and the proposed amendment thereto.

In consequence of the above and to fulfill its international treaty obligation, Congress has enacted the Act of January 17, 1914 (Public, No. 46, 63d Cong., 1st sess.), also another Act of January 17, 1914 (Public, No. 4, 63d Cong., 1st sess., 2d sess.), and the recent Act of December 17, 1914 (Public, No. 223, 63d Cong., 2d sess.). (See, in reference to these acts, House Report No. 23, House Report No. 24, Senate Report No. 132, 63d Cong., 1st sess.)

THE ARGUMENT.

ANSWER TO POINT I OF PLAINTIFFS IN ERROR'S BRIEF. (pp. 16–45.)

I. Section 2 of the Opium Exclusion Act of 1909 is drafted from and is practically word for word identical with section 3082 of the Revised Statutes, which has

been frequently considered by this Court and which has always been accepted without question as constitutional.

We have it upon the authority of the late Sereno E. Payne that the bill, which was enacted into law as the act of February 9, 1909, was drafted by the former Secretary of State, Elihu Root, and that the second section was redrafted from section 3082 of the Revised Statutes. (Cong. Rec., vol. 43, pt. 2, p. 1681.) This is confirmed by comparison of the two Acts.

Revised Statutes, section 3082.—If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any *merchandise,*	*Act of February 9, 1909, section 2.*—If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof
contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise*	contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative*
after importation, knowing the same to have been imported contrary to law, such merchandise	*thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative*
shall be forfeited	*thereof shall be forfeited and shall be destroyed,*
and the offender shall be	and the offender shall be

fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods,	fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof,
such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.	such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

The two acts are *identical* except that in the Opium Act the words "opium or preparation or derivative thereof" have been substituted for the word "merchandise," as the same occurs in Revised Statutes, section 3082, and the words "and shall be destroyed" have been inserted after the word "forfeited."

Section 3082 of the Revised Statutes was enacted in its present form in 1866 (14 Stat., p. 179, c. 201, sec. 4, act of July 18, 1866, "An act to prevent smuggling and for other purposes"). This section has been the subject of frequent consideration by this Court and lower Federal courts, and its constitutionality has never been questioned.

The particular clause relating to persons who "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after transportation knowing the same to have been imported contrary to law," has been assumed to be valid in the following criminal cases based upon such clause:

United States v. *Thomas* (1870), 4 Ben. 370.

United States v. *Fifty-Three Boxes*, etc. (1870) 2 Bond. 354.

United States v. *Landsberg* (1870), 14 Fed. Cas. No. 8041.

United States v. *Claflin* (1878), 13 Blatchf. 178.

United States v. *Kee Ho* (1887), 33 Fed. 333.

United States v. *Sauer* (1896), 73 Fed. 671, 676.

Dunbar v. *United States* (1895), 156 U. S. 185, 198:

> This instruction, it must be borne in mind, is given in reference to that count in the indictment which charges the defendant with facilitating the transportation of the opium and not those which charge him with being himself the party who was guilty of smuggling. If he knowingly permits the appropriation of the proceeds of the smuggled opium to his own benefit, either in the payment of his drafts or in increasing the amount of his account at the bank, *he is helping to make successful the unlawful venture*, and certainly those facts would be inconsistent with the idea of his entire innocence in respect to the matter.

Reagan v. *United States* (1895), 157 U. S. 301.

Amado v. *United States* (1904), 195 U. S. 172.

And in the following forfeiture cases based on said clause:

United States v. *Ninety-Five Boxes, etc.* (1874), Fed. Cas. No. 15891.

United States v. *Lot of Jewelry* (1894), 59 Fed. 684.

United States v. *A Lot of Precious Stones* (1905), 134 Fed. 61.

And in the following criminal cases relating in general to the section:

United States v. *Merriam* (1871), Fed. Cas. No. 15759.

Keck v. *United States* (1899), 172 U. S. 434, in which the first count of the indictment was based on section 3082, which section the court must have assumed to be valid, as it discussed (on p. 437) the requirements thereunder.

United States v. *Chesbrough* (1910), 176 Fed. 778.

Rogers v. *United States* (1910), 180 Fed. 54.

United States v. *Ah Fook* (1910), 183 Fed. 33.

And in the following forfeiture cases relating in general to the section:

The Ariel and Cargo (1867), 1 Haskell 65, 77.

Stockwell v. *United States* (1871), 13 Wall. 531.

United States v. *Jordan* (1876), 2 Lowell 537.

United States v. *Ninety Demijohns, etc.* (1880), 8 Fed. 485, 487.

United States v. *Lot of Jewelry* (1875), 13 Blatchf. 60, 65.

United States v. *Claflin* (1878), 97 U. S. 546.

Von Cotzhausen v. *Nazro* (1879), 15 Fed. 891.—Affirmed (1882), 107 U. S. 215.

Friedenstein v. *United States* (1888), 125 U. S. 224, 233.

United States v. *One Pearl Necklace* (1900), 105 Fed. 357.

United States v. *One Pearl Necklace* (1901), 111 Fed. 164.

United States v. *Five Pieces of Tapestry* (1902), 114 Fed. 496.

Dodge v. *United States* (1904), 131 Fed. 849.

One Pearl Chain v. *United States* (1903), 123 Fed. 371.

United States v. *One Pearl Chain* (1904), 139 Fed. 510.

United States v. *One Pearl Chain* (1905), 139 Fed. 513.

United States v. *Fifty Waltham Watch Movements* (1905), 139 Fed. 291.

United States v. *646 Half Boxes of Figs* (1908) 164 Fed. 778, 780.

Section 4 of the Act of July 18, 1866, above quoted (R. S. 3082), was an extension of section 69 of the Customs Act of March 2, 1799 (1 Stat. 678, c. 22), which reads as follows:

> SEC. 69. And be it further enacted, that all goods, wares or merchandise which shall be seized by virtue of this act, shall be put into, and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had

as by this act are required, to ascertain whether the same have been forfeited, or not; and if it shall be adjudged that they are not forfeited, they shall be forthwith restored to the owner or owners, claimant or claimants thereof; *and if any person or persons shall conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act, such person or persons shall on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so concealed or purchased.*

And of the Act of March 3, 1823 (3 Stat. 781):

SEC. 2. And be it further enacted, that if any person or persons shall *receive, conceal, or buy, any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue,* such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so received, concealed, or purchased.

These two Acts were assumed to be valid in cases decided under them as follows:

United States v. *Farnsworth* (1815), 1 Mason 1.

Clark et al v. *Protection Ins. Co.* (1840), 1 Story 109, 122.

Ex parte Hoyt (1839), 13 Peters 279.

Walsh v. *United States* (1847), Fed. Cas. No. 17116.

Stockwell v. *United States* (1871), 13 Wall. 531.

It thus appears that for 100 years the power of Congress to compel persons who knowingly receive, conceal, etc., goods liable to seizure—i. e., unlawfully imported—to forfeit and pay double their value has been enforced by the courts; and for 50 years the power of Congress to constitute it a crime for a person to receive, conceal, etc., goods unlawfully imported, having knowledge of such unlawful importation, has been enforced by the courts.

It is confidently submitted that this Court will not now, after so long-continued assumption by the courts of the constitutionality of such provisions, decide that Revised Statutes, section 3082, is unconstitutional.

But if Revised Statutes, section 3082, is *constitutional*, then, clearly, the Opium Act of 1909, section 2, must be likewise constitutional, for their provisions are identical.

If, as has been conceded for 50 years, Congress can make a given action a crime when committed in furtherance of the importation of goods in an illegal manner, *a fortiori* it can make the same action a crime when committed in furtherance of an importation of goods which is absolutely prohibited. The purpose of such legislation as the Act of 1823 and the Act of 1866 is well stated in *Stockwell* v. *United States* (1871), 13 Wall. 531, pp. 546, 547, 551:

> When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes upon the importer the obliga-

tion to pay the legal charges. Besides this, the goods themselves, if the duties be not paid, are subject to seizure and appropriation by the Government. In a very important sense they become the property of the Government. Every act, therefore, which interferes with the right of the Government to seize and appropriate the property which has been forfeited to it, or which may hinder the exercise of its right to seize and appropriate such property, is a wrong to property rights, and is a fit subject for indemnity. Now, it is against interference with the right of the Government to seize and appropriate to its own use property illegally imported that the statute of 1823 was aimed. It was to secure indemnity for a wrong to rights of property. The instant that goods are illegally imported, the instant that they pass through the custom-house without the payment of duties, the right of the Government to seize and appropriate them becomes perfect. *If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether the possibility of the Government's availing itself of its right and securing the property. * * * The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a Government seizure, and impairs, therefore, the value of the Government right.* * * * (pp. 546–547.)

It is next contended that section second of the act of 1823 can not be construed to apply

> to the illegal importers themselves. As it extends only to acts done after the illegal importation and requires knowledge of its illegality, it is argued that it aims rather at accessories after the fact. We think, however, it embraces both. If it does not, then greater liabilities are laid on the accessory than on the principal. The mischief at which the act aimed was, as we have seen, embarrassing the right of the Government to seize the forfeited goods. That may be done as well by importers as others. They may receive the goods or conceal them, and the wrong to the Government is precisely the same, whether the concealment is by them or by others who were not the importers. It certainly would be most strange if the accessory to a wrongful act were held responsible therefor when the principal goes free. As was said in *Graham* v. *Pocock*, the question who is liable for receiving, concealing, or buying the shingles is a question to be determined irrespective of the inquiry who is the principal and who the accessory. * * * (pp. 550–551.)

The words "imported contrary to law" as used in Revised Statutes, section 3082, may refer to goods imported in violation of any statute and are not confined to goods imported merely in violation of the original Act of 1866. See *United States* v. *Thomas* (1870), 4 Ben., 370.

Therefore the penal provisions of section 3082 many apply to importations in violation of many other prohibitory statutes. If this Court shall now hold

such section to be unconstitutional so far as affects the receiving, concealing, etc., of forbidden imports, it may render unenforceable to a large degree many of these other prohibitory statutes of great importance to the national welfare.

Copyrighted books: Act of March 3, 1891, c. 565, sec. 3 (26 Stat. 1107).

Fraudulent trade-marked articles: Act of July 24, 1897, c. 11, sec. 11 (30 Stat. 207).

White phosphorus matches: Act of April 9, 1912, c. 75, sec. 10 (37 Stat. 83).

Prize fight films: Act of July 31, 1912, c. 263, sec. 1 (37 Stat. 241).

Nursery stock: Act of August 20, 1912, c. 308, sec. 1 (37 Stat. 315).

Convict-made goods: Act of October 3, 1913, c. 16, sec. IV, par. H, subsec. 2 (38 Stat. 195).

Aigrettes: Act of October 3, 1913, c. 16, item 347 (38 Stat. 148).

Obscene books, etc.: Act of October, 1913, c. 16, par. G, subsecs. 1, 2 (38 Stat. 194).

Neat cattle: Act of October 3, 1913, c. 16, par. H (38 Stat. 195).

Particular notice should be given in this connection to the act of August 24, 1912, c. 382 (37 Stat. 507), forbidding importation of adulterated grain and seeds, section 4 of which provides as follows:

That any person or persons who shall knowingly violate the provisions of this act shall be deemed guilty of a misdemeanor and shall pay a fine of not exceeding five hundred dollars and not less than two hundred dollars:

Provided, That any person or persons who shall knowingly sell for seeding purposes seeds or grain which were imported under the provisions of this Act for the purpose of manufacture shall be deemed guilty of a violation of this act.

It is evident that there is no distinction between the italicized portion of this act and the part of the Opium Act the constitutionality of which the plaintiff in error contests.

For other examples of statutory prohibition of imports see:

Act of March 2, 1799, c. 22, secs. 23, 92 (1 Stat. 644, 697).

The Non-intercourse Acts of April 18, 1806 (2 Stat. 379), and February 27, 1808 (2 Stat. 469).

Act of August 30, 1842, c. 270, sec. 28 (4 Stat. 566); act of March 2, 1857, c. 63 (4 Stat. 168), prescribing forfeiture and destruction of indecent prints imported.

Act of February 25, 1862, c. 33, sec. 7 (12 Stat. 347).

Acts of December 18, 1865, c. 2, and March 6, 1866, c. 12 (14 Stat. 1 and 3).

Act of July 28, 1866, c. 298, sec. 1 (14 Stat. 328).

Act. of July 14, 1870, c. 255, sec. 21 (16 Stat. 263).

Act of March 3, 1871, c. 125 (16 Stat. 580).

Act of March 3, 1873, c. 258, sec. 3 (17 Stat. 599).

Act of March 2, 1883, c. 64 (22 Stat. 451).

Act of March 3, 1883, c. 121, sec. 6 (22 Stat. 489).

Act of February 28, 1887, c. 288 (24 Stat. 434).

Act of March 3, 1887, c. 339 (24 Stat. 476).

II. The Opium Exclusion Act of 1909 is within the power conferred upon Congress by Article I, section 8, of the Constitution to regulate commerce with foreign nations.

It is admitted and indeed thoroughly established by the decisions of this Court that the power to regulate commerce with foreign nations includes the power to prohibit the importation into the United States of any article or articles which Congress may see fit to exclude.

The Abby Dodge (1912), 223 U. S. 166, 176.
United States v. *Marigold* (1850), 9 How. 560, 566.

In *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, the Court said (p. 492):

> Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude mer-

> chandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. (9 Stat. 237; Rev. Stat. sec. 2933 et seq.)

(See also authorities cited in Government's brief in the *Lottery* case (1903), 188 U. S. 321, 341–343.)

Power to regulate (or prohibit) commerce in certain directions may be exercised not merely for the benefit of commerce itself but for the general welfare of the Nation.

> *United States* v. *Marigold* (1850) 9 How. 560, 566: * * * it can scarcely, at this day, be open to doubt, that every subject, falling within the legitimate sphere of commercial regulation, may be partially or wholly excluded, when either measure *shall be demanded by the safety or by the important interests of the entire nation.*

To the same effect see *United States* v. *The William* (1808), 28 Fed. Cas. 614, case No. 16700, at p. 621.

Having, then, the undoubted power under the Commerce Clause to forbid the entry of merchandise into the United States, Congress may "make all laws which shall be necessary and proper for carrying into execution" the foregoing power. (Constitution, art. 1, sec. 8, c. 18.) By settled construction, the words "necessary and proper" are not limited to such measures as are absolutely and in-

dispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are plainly adapted to the end to be accomplished, which are not prohibited and which are consistent with the letter and spirit of the Constitution, and which in the judgment of Congress will accomplish that end.

What, then, is the end which Congress had in view in passing the Opium Exclusion Act of 1909? Without hesitation we can answer that the primary purpose of the Act was *to prevent the importation of opium and its derivatives into this country.* Everything else in the Act is incidental to and in pursuance of this main purpose. In the House of Representatives, Mr. Payne, in reporting the bill from the Ways and Means Committee, said:

> The object of the bill is *to prohibit the importation of opium* prepared for smoking, or smoking opium. The language goes to the importation of all opium, with a proviso that opium for medicinal purposes may be imported under rules and regulations prescribed by the Secretary of the Treasury. The second section is redrafted from section 3082 of the Revised Statutes, which provides punishment for knowingly or fraudulently disobeying the laws in reference to the *importation* of articles in general, applying that section to the *importation of opium* into the United States. (Cong. Rec., vol. 43, pt. 2, p. 1681, 60th Cong., 2d sess., Feb. 1, 1909.)

See also *United States* v. *Caminata* (1912) 194 Fed. 903, in which, on an indictment under the Opium Act of 1909, the Court said (adopting the language of the United States Attorney's brief):

> This act is not a customs law designed to avoid fraud upon the revenue, but is purely a prohibitory statute, absolutely forbidding the bringing into this country from abroad of an article deemed by Congress to be injurious to the health and morals of our people. The act has no relation to the customs system, and the fine distinctions which are discussed in the customs cases, relating to the time when the obligation to pay customs duties first accrues, have no bearing whatever upon a case of this character (p. 904).

The Government maintains that the contested portion of section 2 of the Act is a proper and appropriate means for enforcing the prohibition of opium importation. Without it, the effective prohibition which the Act seeks to insure would be difficult, if not impossible. The contested provisions are more than appropriate; they are well-nigh *indispensable*. The reason for this is found in the nature of the opium trade itself. It is a well-known fact that the traffic in opium is carried on with the utmost secrecy and that every year large quantities of the drug have been smuggled into the country in spite of the vigilance of the customs officials. It is a matter of common knowledge that opium is not produced in this country. The raw product comes almost exclusively from China. (See Cong. Rec., vol. 43, p. 1681 et seq.; message of

President Taft upon the opium problem, 61st Cong., 2d sess., Senate Doc. 377.) Owing to the ease with which opium may be hidden and smuggled into the country undetected, its importation can not be effectively stopped unless those who deal in such smuggled opium after its importation can be reached and punished by the Government. A large amount of opium has been brought into the country by being smuggled over the Mexican border by land. (See Senate Doc. 377, *supra*.) If those who receive unlawfully imported opium *knowing it to be unlawfully imported* (as provided in the Act), become, by taking such opium, liable to punishment, the effect will be to discourage importation, for the risks of those who buy from the importers will be greatly increased. When importers find that they are unable to dispose of the opium they have unlawfully brought in, they will cease to attempt importation of that from which a profit can no longer be made.

Under the contested portion of section 2 of the Opium Act *knowledge of the illegal importation* is made an essential element of the crime.

> *United States* v. *Sauer* (1896), 73 Fed. 671, 676.
>
> Section 3082 of the Revised Statutes does not make the mere receipt or concealment of smuggled goods an offense. There must be, on the part of the person receiving or concealing the goods after their importation, knowledge of their illegal importation.

The requirement of *knowledge* furnishes clear evidence that the fundamental and single purpose of the

Act was effectively to prevent the importation of opium. He who receives opium or does with opium any of the acts prohibited must ascertain at his peril whether such opium was imported contrary to law. Opium is not subject to forfeiture and destruction unless it is in the hands of one who has fraudulently or knowingly imported it, or of one who has received or concealed it knowing it to have been imported contrary to law.

The importation of smoking opium being absolutely illegal, its presence or continuance in the United States after being so imported is illegal. Congress, by the statute itself, gave to the Government the right to forfeit and destroy such opium wherever it should be found.

Congress has ample power to authorize the destruction of articles which it has prohibited as articles of commerce, and such destruction is an appropriate means for enforcing the prohibition.

> *Hipolite Egg Co.* v. *United States* (1911), 220 U. S. 45.
>
> *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, 497.
>
> *Sentell* v. *New Orleans, etc., R. Co.* (1897), 166 U. S. 698, 705.
>
> *North American Cold Storage Co.* v. *Chicago* (1908), 211 U. S. 306, 315.
>
> *Lawton* v. *Steele* (1894), 152 U. S. 133.
>
> *29 Opin. Atty. Gen. 603* (1912), and cases cited.

And it is not essential that such article, when destroyed, should be in the original package.

McDermott v. *Wisconsin* (1913), 228 U. S. 115. See *infra*.

The power existing to forbid the importation of opium, "the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted," or which have "reasonable relation to this end." (*B. & O. R. R. Co.* v. *Int. Com. Comm.* (1911), 221 U. S. p. 619; *Lewis Publishing Co.* v. *Morgan* (1913), 229 U. S., 314.) Hence, Congress could make criminal any act having a direct or reasonably closely related tendency to interfere with the Government's right to seize and destroy such opium. Clearly, the selling or concealing or facilitating the transport of the forbidden article, with knowledge of its illegal importation, had such tendency to place obstacles in the way of the Government's right to seize and to make more remote the chances of sucessful detection by the Government of the presence of the forbidden article.

This is the precise ground on which the constitutionality of Revised Statutes, section 3082 (Act of July 18, 1866; act of Mar. 23, 1823; Act of Mar. 2, 1799, sec. 69), has been upheld, or at least assumed, for 100 years in the numerous cases founded on those acts. See especially *Stockwell* v. *United States* (1871), 13 Wall., 531, pp. 546, 547, quoted *supra*, p. 21. (Note: The *Stockwell case* was modified in its decision by *United States* v. *Claflin* (1878), 97 U. S.,

546, but nothing in the latter decision interfered with the reasoning above quoted.)

Clearly, the relation between the object sought to be attained by Congress and the means which it provided to effectuate its objects in the Opium Act were not within the objection raised by the Court in *United States* v. *De Witt* (1873), 9 Wall., 41, in which it was said as to the disputed provisions of the act there in question:

> This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power * * * (p. 44).

The inference to be drawn from the above language is that if the consequence were NOT "too remote and too uncertain" the statute would be upheld.

This Court will not hold that the relation of the means provided by the act to the purpose of the act was so remote and uncertain as to make the act unconstitutional, except in the clearest possible case, where no other decision would be within reason.

In *Nicol* v. *Ames* (1898), 173 U. S. 509, 514–515, the court said:

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court

> should hold an act of the lawmaking power of the Nation to be in violation of that fundamental instrument upon which all the powers of the Government rest.

And in *Henderson Bridge Co.* v. *Henderson City* (1899), 173 U. S. 592, 615, the Court said:

> * * * an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute. * * *

The prohibition of opium importation being thus a legitimate object, and the means adopted by Congress for effecting that object appropriate, and, in fact, necessary, there can be no doubt as to the validity of section 2 of the Act under Article 1, Section 8, of the Constitution. Chief Justice Marshall said in *Brown* v. *Maryland* (1827), 12 Wheat. 419, at p. 446:

> It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value.

Substitute in this quotation for the word "authorize" the one word "*prohibit*," and in reading the word "traffic," think of the opium trade, and what could more aptly fit the precise case at bar?

The broad principles upon which it is submitted the constitutionality of this statute should be sustained, and to which we have already adverted, have

long been set above and beyond the level of argument. The cases in the Federal courts, however, involving the constitutionality of Federal statutes under the Commerce Clause, are few, compared with the vast number of decisions involving encroachment by State statutes upon the powers of Congress under the Commerce Clause.

United States v. *Coombs* (1838), 12 Pet. 72, is, however, to be especially noted. Defendant was indicted under an act of Congress approved March 3, 1825, which made it criminal for any person to steal property belonging to any vessel in distress or wrecked upon a shoal or other place within the maritime jurisdiction of the United States. He was charged with stealing from a beach upon the New York shore goods belonging to a ship which had run upon a shoal. *It was admitted that the goods when taken were above high-water mark.* It was *held* that Congress had power to pass the statute under the Commerce Clause and that the indictment was therefore good.

Justice Story, delivering the opinion of the Court, said (p. 77):

> The power to regulate commerce * * * does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. *It extends to such acts, done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations* and among the States. Any offense which thus interferes with, obstructs or prevents such commerce and

> navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. * * *
>
> It is nowhere stated, that this property, belonging to any ship or vessel, shall be in any of the enumerated places, when the offense is committed; but only that it shall be property belonging to the ship or vessel which is in distress, or wrecked, lost, stranded or cast away. *Locality, then, is attached to the ship or vessel, and not to the property plundered, stolen or destroyed.*

By analogy, we may say in the case at bar that "locality is attached" to the act of importing opium contrary to law. He, then, who receives opium, knowing of its unlawful entry, is amenable to the laws of the United States. It is true that Justice Story was speaking of acts which tended to hinder or obstruct the free course of commerce, while in the case at bar commerce, so far as concerns opium, has been prohibited. But his reasoning is nevertheless applicable. For if Congress, where its will is that commerce shall be unobstructed, may prohibit the doing of acts within the borders of a State which tend to impede commerce (even though the very same acts may be subject to prohibition by the State under its police power), then equally must it be true that where Congress, in the exercise of its undoubted powers under the Commerce Clause, has prohibited commerce in a particular article the incidental im-

plied power exists to punish acts which will impede or obstruct the *prohibition* which Congress would see enforced.

III. Congress having power to make criminal the importation of an article, may provide for the punishment as an accessory of one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of an article after importation, knowing the same to have been imported contrary to law.

1. *Hawkins, Pleas of the Crown*, 232, 234, 235:

> Forasmuch as thieves and robbers are much encouraged to commit offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods, it is enacted by 3 Will. and Mar., c. 9. f. 4. and 5. Ann. c. 31. f. 5. "that whoever shall buy or receive any goods or chattels, (1) that shall be feloniously taken or stolen from any other person, *knowing the same to be stolen*, shall be taken and deemed an accessory to such felony after the fact." * * *
>
> And it is also enacted by 29 Geo. 2, 30, "that every person who shall buy or receive any lead, iron, copper, brass, bell metal, or solder, *knowing the same to be unlawfully come by*," etc. * * *
>
> And it is further enacted by 2 Geo. 3, c. 28, "that whoever shall buy or receive any part of the cargo or loading of, or any goods, stores, or things of, or belonging to any ship or vessel in the River Thames, *knowing the same to be stolen, or unlawfully come by*," etc. * * *

> And it is also enacted by 10 Geo. 3, c. 48, "that every person who shall buy, or receive any stolen jewel, or jewels, or any stolen gold or silver plate, watch or watches, *knowing the same to have been stolen*," * * *
>
> And it is further enacted by 21 Geo. 3, c. 69, "that every person who shall buy, or receive any pewter pot, or other vessel, or any pewter in any form or shape whatever, *knowing the same to be stolen or unlawfully come by*," etc. * * *

These quotations from English statutes have been set forth to show their striking similarity to the language of the Opium Exclusion Act.

At common law a man did not become an accessory by receiving stolen goods, but by receiving and giving aid to the *thief*.

> 1. *Hale, Pleas of the Crown*, 619: If A hath his goods stolen by B, and C, knowing they were stolen, receives them, this simply of itself makes not an accessory, and therefore it hath been often ruled that to say S *hath received stolen goods knowing them to be stolen*, is not actionable, because it imports not felony, but only a trespass or misdemeanor, punishable by fine and imprisonment, for the indictment of an accessory *after*, is that he received and maintained *the thief* not *the goods*.

But, as shown by the statute (3 Will. and Mar.) quoted above, *the receiver of stolen goods was made by statute an accessory after the fact*. Statutes making criminal the receipt of stolen goods with knowledge that they were stolen are now practically universal.

They establish the common view that one who knowingly receives stolen goods *ipso facto* creates a criminal relationship between himself and the original act of theft.

In all of the States, the receipt of stolen goods is made a substantive offense punishable apart from the prosecution of the original thief. But the reason for this is not that the legislatures considered that there was no relation between the receipt of stolen goods and the original theft, but because of the peculiar common-law rule that an *accessory* could not be punished until after the conviction of the *principal.* Consequently the receipt of stolen goods has by all the statutes been made a distinct offense punishable whether or not the original thief has been convicted, and many of the statutes specifically provide that a prior conviction of the principal thief shall not be necessary for a conviction for receiving the stolen goods. A full list of the State statutes is given in the footnote.[1]

---

[1] *Alabama:* Code (1907), secs. 7328, 7329; embezzled property, secs. 6841, 6842.
Arizona: Penal Code, secs. 493, 494.
Arkansas: Rev. Stat. (1874), secs. 1359, 1360.
California: Penal Code (1906), secs. 496, 497; same as Arizona statute.
Colorado: Statutes annotated (1911), sec. 1686.
Connecticut: Gen. Stat. (Revision of 1902), sec. 1210.
Delaware: R. S. 1852 (as amended to 1892), p. 937.
Florida: Gen. Stat. (1906), sec. 3304.
Georgia: Penal Code (1910), secs. 168, 169—Accessory.
Hawaii: Penal Laws of the Hawaiian Islands (1897), ch. 20, secs. 170–176.
Idaho: Rev. Codes (1908), secs. 7057, 7058.
Illinois: Criminal Code, secs. 239–241, incl. (Rev. St. 1913, p. 852).
Indiana: Burns Annot. Ind. Stat. (1908), secs. 2273, 2274.
Iowa: Annot. Code (1897), secs. 4845, 4848.
Kansas: Gen. Stat. (1909), secs. 2582, 2583.

The statutes in Georgia and Pennsylvania are particularly significant.[2] In Georgia, the receiver of

Kentucky: Statutes (Carroll, 1909), sec. 1199.

Louisiana: Rev. Laws (Wolff) 1904, sec. 832—Receiving goods and receiving thief both provided for in same section.

Maine: Rev. Stat. 1904, ch. 121, sec. 12.

Maryland: Code (1904), art. 27, sec. 371.

Massachusetts: Rev. Stat. (1902), ch. 208, secs. 51, 52, 53.

Michigan: Howell's Annot. Stat. (1913), secs. 14605, 14608.

Minnesota: Rev. Laws 1905, sec. 5093.

Mississippi: Code of 1906, secs. 1259, 1514.

Missouri: R. S. 1909, secs. 4554, 4555.

Montana: Rev. Codes 1907; Penal Code, sec. 8662.

Nebraska: (Embezzled property) Cobbey's Anno. Stat. (1909), sec. 2200; (stolen property) id., secs. 2188, 2189, 2190, 2191, 2195.

Nevada: Rev. Laws (1902), sec. 6648.

New Hampshire: Public Statutes (1901), ch. 275, p. 828, sec. 13.

New Jersey: Comp. Stat. (1910), p. 1795, sec. 166; P. L. 1906, p. 431—Harboring thief in same section.

New Mexico: Compiled Laws 1897, secs. 1117, 1118, 1119.

New York: Penal Law, sec. 1308, 1309.

North Carolina: Revisal of 1905, sec. 3507.

North Dakota: Rev. Codes 1905; Penal Code, secs. 9199, 9201.

Ohio: Page & Adams Annot. Code 1910, sec. 12450.

Oklahoma: Rev. Laws (1910), sec. 2664.

Oregon: Bell & Cotton Annot. Codes and Stat. (1901), sec. 1809.

Pennsylvania: Purdon's Digest 1905, p. 1006, par. 446, 447—Felony in Pennsylvania; See also act of Apr. 23, 1909, sec. 1, P. L. 159 (Purdon's Digest, Supplement 1909, p. 5378).

Rhode Island: Gen. Laws, Revision of 1909, ch. 345, sec. 13.

South Carolina: Code (1912); Criminal Code, sec. 204.

South Dakota: Comp. Laws 1913, p. 633; Penal Code, sec. 618.

Tennessee: Code 4683 (1873–1895).

Texas: Penal Code, art. 878, act of Mar. 20, 1897.

Utah: Rev. Stat. 1898; Penal Code, secs. 4367, 4368.

Vermont: Pub. Stat. (1906), sec. 5763.

Virginia: Code (1904), sec. 3714.

Washington: Pierce's Code (1912), Tit. 135, sec. 1563.

West Virginia: Code 1913, sec. 5209.

Wisconsin: Statutes 1911, sec. 4417, ch. 182.

Wyoming: Comp. Stat. 1910, secs. 5831, 6228.

[2] *Georgia, Penal Code* (1910):

SEC. 168. **Receiving stolen goods:** If any person shall buy or receive any goods, chattels, money, or other effects that shall have been stolen or feloniously taken from another, knowing the same to be stolen or feloniously

stolen goods is punished as an accessory to the original theft, and in Pennsylvania it is provided that prosecution, conviction, and sentence of receivers of stolen goods shall exempt them from being prosecuted as accessories after the fact, in case the principal shall be afterwards convicted, the inference being that in the absence of this provision they *would be* punishable as *accessories after the fact.*

The fundamental basis for such a statute is the enforcement of the public policy against stealing. To prevent stealing is their underlying object. For if a man could without subjecting himself to criminal prosecution knowingly receive stolen property, thieves and burglars would ply their trade with far more assurance of gain. The effect of such statutes is to discourage larceny and kindred crimes by closing the markets for the disposition of stolen goods.

---

taken, such person shall be an accessory after the fact, and shall receive the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the property.

SEC. 169. **If principal can not be taken:** If the principal thief can not be taken, so as to be prosecuted, the person buying or receiving any goods, chattels, money, or effects stolen or feloniously taken by such principal thief, knowing the same to be stolen or feloniously taken, shall be punished as prescribed in the preceding section; and a conviction under this section shall be a bar to any prosecution under the preceding section.

Pennsylvania, Purdon's Digest (1905), p. 1006:

446. If any person shall buy or receive (*a*) any goods, chattels, moneys, or securities, or any other matter or thing, the stealing of which is made larceny by any law of this Commonwealth; (*b*) knowing the same to be stolen or feloniously taken; (*c*) such person shall be guilty of felony, and, on conviction, (*d*) suffer the like pains and penalties (*e*) which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same (*f*).

447. It may and shall be lawful to prosecute and punish all buyers and receivers, as well before as after the principal felon shall be taken and convicted, and whether he be amenable to justice or otherwise; which prosecution, conviction, and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact, in case the principal felon shall be afterwards convicted.

The Government asserts that the Opium Exclusion Act of 1909 had the same end in view—to bring about the effective prohibition of the importation of opium by closing the avenues of disposition.

The analogy above pointed out is specifically asserted as the essence of the crime established by Congress in the Act of 1866 and Rev. Stat., sec. 3082, in *United States* v. *Claflin* (1875), 13 Blatchf. 178, 182, where the indictment charged concealing, etc., goods knowing the same to have been imported contrary to law:

> I pass, therefore, to consider the next objection—that the illegality in the importation of these cases is not properly stated. In support of this objection, the proposition is ad-advanced, that an indictment for buying goods which have been brought into the United States contrary to law must set out the offence committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offence. Such a proposition can not be maintained. *The offence of knowingly buying smuggled goods is similar in character to that of receiving stolen goods*, so much so that it has been conceded that the rule applied to indictments for receiving stolen goods may be properly applied to this indictment. The concession is fatal to the objection under consideration. The rule applying to indictments for receiving stolen goods is thus given by Roscoe: "It is not necessary to state in the indictment the

> name of the principal felon, and the practice is merely to state the goods to have been before then feloniously stolen." (Roscoe's criminal Ev. 885; see, also, 2 Wharton, secs. 1899, 1900.) * * *

See to the same effect quotation from *Stockwell v. United States, supra* p. 22.

The power of Congress to declare that the receipt, purchase, concealment, or sale of goods unlawfully imported, *knowing that they have been brought in contrary to law,* shall constitute an offense against the United States is closely connected with the offense of unlawfully importing. In this respect the analogy of statutes making the receiver of stolen goods an accessory after the fact is sufficient to indicate that the act of receiving, etc., unlawfully imported goods with knowledge of the illegal importation is not so far removed and remote from the illegal importation itself as to be beyond the power of Congress to punish.

IV. Cases Urged by Plaintiffs in Error to Conflict with the Above Contentions.

No case cited by the plaintiffs in error in their brief to support their contention that section 2 of the Opium Act of 1909 is unconstitutional is direct authority for such proposition. The general principle running through all the cases, that Congress and the States are each supreme in their several spheres, is undisputed. But in not one of them was the application of that principle to the facts

such as to cast any shadow upon the constitutionality of the act now under consideration.

The case nearest in point cited by the plaintiffs in error is *United States* v. *Gould* (1860), 25 Fed. Cases 1375, case No. 15239. There the defendant was indicted under section 7 of the act of Congress of April 20, 1818 (3 Stat., 450), which made it unlawful for any person to "hold, purchase, sell, or otherwise dispose of any negro * * * for a slave, etc., * * * who shall have been imported or brought, in any way, from any foreign kingdom, etc., * * * into any port or place within the jurisdiction of the United States." The District Court held that although Congress had power to prohibit the importation of negroes for purposes of slavery, Congress could not make it a crime to hold a negro as a slave where there was no participation in the original importation and the negro had become mingled with the population of the State.

This case is distinguishable from the case at bar in two important particulars:

1. The statute there involved did not make *knowledge of the illegal importation an element of* the crime.

2. It appears that the defendant in fact had no knowledge of the illegal importation of the particular negro whom he was charged with holding for purposes of slavery. This is clearly stated on page 1376, where the Court says:

> It is conceded by the district attorney of the United States that the indictment is under the 7th and not the 6th section of the act of

> April 20, 1818, and that he does not charge, and does not expect to prove, that Mr. Gould in any manner participated in or had any knowledge of the illegal importation.

Keller v. *United States* (1909), 213 U. S. 138, is also relied upon by the plaintiffs in error. This case involved the act of February 20, 1907 (34 Stat., 898, c. 1134), part of which made it a felony to harbor for purposes of prostitution an alien woman within three years after her entry into the United States. It was *held* that the act was unconstitutional as to one harboring such a prostitute without knowledge of her alienage or participation in her coming into the United States.

This case is also to be distinguished upon much the same grounds as the *Gould* case. Under the Act of 1907, *knowledge* by the defendant, that the woman harbored as a prostitute was an alien who had come into the country within three years, was *not* made an element of the crime. Therein lay its fatal defect. *There was nothing to connect the offense with the entry of the alien*, as to which it was admitted Congress had full power of regulation and control.

On page 147 the Court says:

> As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it * * *. In view of those facts, the question of the power of Congress to punish those who assist in the

importation of a prostitute is entirely immaterial.

Mr. Justice Holmes (Justices Harlan and Moody concurring) stated, in their dissenting opinion (p. 150):

> If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who cooperate in their fraudulent entry. If Congress has power to exclude such laborers, * * * it has the power to punish any who assist in their introduction. That was the point decided in *Lees* v. *United States*, 150 U. S. 476, 480. *The same power must exist as to co-operation in an equally unlawful stay. The indictment sets forth the facts that constitute such co-operation and need not allege the conclusion of law.*

It is submitted that the real point of difference between the majority of the Court and the dissenting judges was a divergency of opinion as to whether the statute attempted to punish "co-operation in an * * * unlawful stay," and whether the indictment did or did not set forth facts showing any such "co-operation."

The statute in the *Keller* case did not, as does the Opium Act in the case at bar, prescribe as one element of the crime the fact that the defendant should deal with the forbidden subject or the illegally imported subject "having knowledge of the illegal importation." In fact, in the *Keller* case it was not shown that the defendant had any knowledge at all that the prostitute in question had been imported illegally. Hence it could not be said that the statute

penalized "co-operation in an unlawful stay," because "co-operation" implies some voluntary action impeding the Government, while the action forbidden by the statute might be performed by the defendant in entire ignorance that he was by such performance co-operating in impeding the Government.

It is submitted that had the majority and minority of the Court in the *Keller* case agreed in their view of the purport of the statute and of the facts proved in the case, they would also have accepted the doctrine that if Congress can forbid the importation of an article, and can require forfeiture and destruction of that article after such importation, it can equally forbid any action which constitutes a reasonably direct "co-operation * * * in the unlawful stay" or presence of that article in this country, or which constitutes a reasonably direct interference with the Government right to search, out, seize, and destroy the article wherever found.

After the decision in the *Keller* case, Congress amended the White-Slave act of February 20, 1907 (34 Stat. 898, c. 1134), by an Act of March 26, 1910 (36 Stat. 264, c. 128, sec. 2), by adding the words "in pursuance of such illegal importation," so that section 3 of the act as amended read as follows:

> That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import into the United States, any alien for the purpose of

> prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose *in pursuance of such illegal importation*, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, *in pursuance of such illegal importation*, any alien, shall in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * *

So amended, the statute was held constitutional in *United States* v. *Krsteff* (1911), 185 Fed. 201, 203, 205:

> *It is clear that Congress has no such power, unless by apt words of the statute those dealings shall relate and have connection with some matter of importation which is made unlawful by Congress, and the matter of the unlawful importation shall be known to the party sought to be charged.*
>
> * * * The importation of an alien woman for an immoral purpose having been made unlawful by the act of February 20, 1907, and being in effect at the time the defendant brought this woman into the United States, and it having been made an offense by the amendment of March 26, 1910, to keep, maintain, control, or support in pursuance of such illegal importation, then to keep, maintain, control, or support an alien woman for an immoral purpose who had been imported unlawfully under the provisions of the act of February 20, 1907, after this amendment was in effect,

> was a matter within the power of Congress to control and regulate by statute, and Congress having so acted, then the keeping, maintaining, controlling, or supporting of an alien woman in a house for an immoral purpose in pursuance of such illegal importation after the amendment of March 26, 1910, was a violation of the act as amended, and subjected the defendant to indictment.

In other words, the White-Slave Law as amended was upheld on the precise ground now urged in behalf of the Opium Act, viz, the dealings made unlawful "relate and have some connection with some matter of importation which is made unlawful by Congress and the matter of the unlawful importation shall be known to the party sought to be charged."

In *United States* v. *Portale* (1914), 235 U. S. 27, the statute involved in the *Keller* case (34 Stat. 898, c. 1134), as amended by the act of March 26, 1910 (36 Stat. 264, c. 128, sec. 2), was considered in the Government's brief and its constitutionality was argued; but the Court in its decision did not find it necessary to consider the question.

"ORIGINAL PACKAGE" CASES NOT APPLICABLE.

Plaintiffs in error in their brief (pp. 36, et seq.) assert that the original-package doctrine laid down by the Court is authority for their contention that Congress has no constitutional power to further its object of prohibition of imports of opium by making criminal the actions in the case at bar.

The contention as phrased by plaintiffs in error in their brief is as follows:

> The court has universally held that there is a limitation to the commerce power of the Federal Government. It has been universally held, as will be shown by the original-package doctrine, that, in so far as legitimate articles of commerce are concerned, the power of the Federal Government is limited in its exercise over such articles as long as the articles remain in their original package and until they have been commingled with the general mass of the property in the State so as to lose their identity. * * * (P. 36.)
>
> The original doctrine, as expressed in this case, has been universally followed by the court. To be sure, it may be that this doctrine will be held inapplicable to articles of commerce which are contraband, and which are excluded from this country. However this may be, there is no decision, although *dicta* are found in the pure food and drug decisions, which extends the power of Congress beyond the original-package doctrine. * * * (P. 37.)

It will be noted from the above that the plaintiffs in error specifically limit the original-package doctrine to "*in so far as legitimate articles of commerce are concerned*"; and they also admit that there is no case holding that this particular doctrine necessarily applies to articles which are excluded from this country by Congress.

There is another point which is to be urged in considering the "original-package" doctrine. The doc-

trine originated with *Brown* v. *Maryland* (1827), 12 Wheat., 419.

In that case and in the cases following it, in which the original-package doctrine has been asserted, including *Vance* v. *Vandercook* (1897), 170 U. S., 438, cited by plaintiffs in error on page 36 of their brief, the Court was considering the question of the power of a State to enact legislation which would in greater or less degree *impede* the free course of interstate or foreign commerce. They were cases where Congress by its silence had indicated tacitly that commerce should be free and unobstructed. The Court was therefore in all these cases seeking to fortify the powers of the National Government against unwarranted State interference. But here the reverse situation arises. Congress has spoken. Congress has said that trade in opium shall be prohibited, and that in order to prevent the importation of this noxious substance anyone who sells it, etc., knowing its unlawful importation, shall be punished. If the State were to attempt to obstruct this policy of exclusion as enacted by Congress, it would be guilty of as clearly an unwarranted interference with the powers of Congress as were the States in the "Original Package" cases in attempting to interfere with the *freedom* of commerce.

On the other hand, where acts of Congress regulating commerce have been involved the Court has not shown a disposition to limit Congress to the same extent. This is admitted by the plaintiffs in error,

as shown by the above quotation from page 37 of their brief.

This distinction has been recognized recently by this Court in *McDermott* v. *Wisconsin* (1913), 228 U. S., 115, 136, where the Court, in speaking of the Federal pure food and drug law, and particularly of that portion of the law which authorizes the confiscation of improperly labeled articles of food remaining "unloaded, unsold, OR in original unbroken packages," says:

> The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. *To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end.* The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.

See also *Hipolite Egg Company* v. *United States* (1911), 220 U. S. 45, 58.

> There is here no conflict of national and State jurisdictions over property legally articles of trade. *The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State.* The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? *To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce.*

Plaintiffs in error (on page 39 of brief) state:

> But, as stated above, although the dicta as to the unlimited power of Congress over contraband articles, whether interstate or foreign commerce, may in some future decision be upheld by this court to be the law, yet, as previously argued, does it not touch the question here at issue—the right to punish the person merely concealing such article, without any connection or relationship with the unlawful importation being shown?

This statement assumes as true the very point on which the Court must decide this case—viz, whether the act of concealing the illegally imported article is in fact and in law an act "without any connection or relationship with the unlawful importation."

It is no objection to the Act that it seeks to punish actions which might be prohibited by State law, or that it partakes of the nature of a police regulation. As said by this Court in the recent case of *Hoke* v. *United States* (1913), 227 U. S. 308, 323, in speaking of the power of Congress to regulate commerce among the States:

> The principle established by the cases is the simple one * * * that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, *and the means may have the quality of police regulations. Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856.

There have been frequent cases in the past where the same act might be punished under either a State or a Federal law. Thus in *Fox* v. *State of Ohio* (1847), 5 How. 410, it was held that a State might punish the offense of uttering or passing false coin as a cheat or fraud practised on its citizens; while in *United States* v. *Marigold* (1850), 9 How. 560, it was held that Congress, in the exercise of its authority under the Commerce Clause and the power to punish counterfeiting might

punish the same act as an offense against the United States. See also *Moore* v. *State of Illinois* (1852), 14 How. 13; *Coleman* v. *Tennessee* (1878), 97 U. S. 509; *Grafton* v. *United States* (1907), 206 U. S. 333, 354. So, although it may be admitted that a State might, in the exercise of its police powers, prohibit the sale of opium within its borders, yet the existence of such power can in no way be asserted as a limitation upon Congress, if, in exercising its powers under the Constitution, Congress sees fit to make the same act an offense against the United States.

ANSWER TO POINT IV OF PLAINTIFFS IN ERROR'S BRIEF (pp. 58–69).

V. The Court properly refused the requested instructions, which assumed as matter of law that it is absolutely necessary for the testimony of accomplices to be corroborated, because—

First, there is no such common law rule, and the rules of evidence under the common law control in criminal actions in Federal courts.

> *Wigmore*, Evidence (1904) 3, sec. 2056: But not until the end of that century (the eighteenth) does any court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated.
>
> (1) But was this practice *founded on a rule of law? Never, in England.* It was recognized constantly that the judge's instruction upon this point was a mere exercise of his

common-law function of advising the jury upon the weight of the evidence, and was not a statement of *a rule of law* binding upon the jury. * * *

In the United States the same discrimination was early accepted. * * *

As a matter of common law, then, the doctrine was universally understood (except by one of two courts) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury. It followed that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony; that they alone were to determine whether corroboration existed and was sufficient; and that the trial judge's omission of the caution was of itself not a ground for a new trial, being a matter solely for the trial judge's discretion.

See also:

Starkie, Evidence (1837), v. 2, p. 12.

Taylor, Evidence (1858), v. 2, p. 796.

Phillips, Evidence (1859), v. 1, p. 110.

Greenleaf, Evidence (1899), v. 1, p. 519, sec. 380.

Underhill, Criminal Evidence (1910), sec. 73, p. 127.

In *Atwood and Robbins* case (1788?), 1 Leach, C. L. 464, the defendants were convicted of conspiracy upon the testimony of an accomplice not corroborated by any material testimony. The prisoners were respited and the case referred to 12

judges as to whether such evidence was sufficient to warrant a conviction. Thereafter Mr. Justice Buller, sentencing the prisoners, said (p. 465):

> And the judges are unanimously of opinion that an accomplice alone is a competent witness; and that, if the jury, weighing the probabillty of his testimony, think him worthy of belief, a conviction supported by such testimony alone *is perfectly legal.*

And (p. 466):

> An accomplice, therefore, being a competent witness, and the jury in the present case having thought him worthy of credit, the verdict of guilty, which has been found, *is strictly legal,* though found on the testimony of the accomplice only.

See also:

Durham and Crowder (1787), 1 Leach C. L. 479.

Rex v. *Jones* (1809), 2 Camp. N. P. R. 132, 133; S. C., 31 How. St. Tr. 251.

Reg. v. *Mullins* (1848), 7 St. Tr. 1111–1113.

Reg. v. *Stubbs* (1855), Dearsley, C. C. 555.

Reg. v. *Boyes* (1859), 1 B. & S. R. 309.

It is quite evident from the foregoing citations that there was no *common-law rule* in England at the time of the passage of the judiciary act of 1789 in this country, which required instructions to juries that the testimony of accomplices must be corroborated. It is the common law (unless modified by decisions of the United States courts) which furnishes the rules of evidence in the trial of criminal cases in the Federal courts:

United States v. *Reid* (1851), 12 How. 360.

Logan v. *United States* (1891), 144 U. S. 263.

The position of the English courts upon the question has been sustained by numerous adjudications in State courts:

Commonwealth v. *Holmes* (1879), 127 Mass. 424.

Commonwealth v. *Bishop* (1896), 165 Mass. 148, 150, per Mr. Justice Holmes.

State v. *Green* (1896), 48 S. C. 136.

And in the Federal courts:

Steinham v. *United States* (1840?), 2 Paine, 168 (C. C., 2d circuit.)

Hanley v. *United States* (1903), 123 Fed. 850 (C. C. A., 2d circuit.)

United States v. *Guiliani* (1906), 147 Fed. 598 (D. C.).

Ahearn v, *United States* (1907), 158 Fed. 607 (C. C. A., 2d circuit.)

Richardson v. *United States* (1910), 181 Fed. 9 (C. C. A., 3d circuit.)

There was no rule of evidence under the common law, either at the time of the enactment of the judiciary act of 1789, or at the time of the admission of the State of California in 1850, requiring that the jury should be warned, or cautioned, or advised against accepting and acting upon the uncorroborated testimony of accomplices. *United States* v. *Reid* (1851), 12 How. 365; *Stat.*, California, 1850, c. 95.

The case of *People* v. *Eckett*, 16 Cal. 112, decided in 1860, cited by plaintiffs in error, held that the refusal of an instruction to the jury that they could not find the defendant guilty on the testimony of an accomplice, was erroneous, citing the case of *Regina* v. *Dyke*, 34 C. L. R. 381, and stating:

> It is held by this and other cases cited by appellant's counsel, that the corroborating evidence to the statements of an accomplice must connect the prisoner with the offence charged.

If this decision is intended to convey the idea that there was a common-law rule requiring an absolute instruction against convicting upon the uncorroborated testimony of an accomplice, it is palpably in conflict with the decisions of the English courts which have been heretofore cited, and is not sustained by the case cited.

In this connection it is pertinent to call attention to the note in Wigmore on Evidence (1904), page 2745, appended to the statement in the text:

> As a matter of common law, then, the doctrine was universally understood (*except by one or two courts*) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury.

Referring to the exception "by one or two courts" the note reads:

> 1860, *People* v. *Eckert*, 16 Cal., 110 (misunderstanding some of the English cases).

Second. The trial court properly advised the jury.

Considering, then, the question of the correct practice, the instructions were likewise properly refused, because the trial court followed the usual custom and advised the jury fully and fairly as to the caution with which accomplice testimony should be received and weighed, saying (Rec., 40):

> The court instructs you on this subject that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the Government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth.

Whatever rights the defendants may have had in the premises were properly safeguarded by this instruction, which followed closely the general custom and practice established in the Federal courts.

Steinham v. *United States* (1840?), 2 Paine, 176–180 (C. C., 2d circuit).

Hanley v. *United States* (1903), 123 Fed. 851 (C. C. A., 2d circuit).

United States v. *Giuliani* (1906), 147 Fed. 598 (D. C.).

Richardson v. *United States* (1910), 181 Fed. 9 (C. C. A., 3d circuit).

Holmgren v. *United States* (1910), 217 U. S. 523–524.

So in the Federal court cases cited by the plaintiffs in error:

In the *Hinz* case, 35 Fed. 277 (plaintiffs in error's brief, p. 62): "Judges in their discretion will *advise* the jury," etc.

In the *Lancaster* case, 44 Fed. 864 (brief, p. 62): "Judges in their discretion will *advise* the jury," etc.

In the *Holmgren* case, 217 U. S. 509 (brief, p. 67): "It is undoubtedly the better practice for courts to *caution* juries," etc.

In the *Reagan* case, 157 U. S. 301 (brief, p. 68): "It is its (the court's) duty to *caution* the jury," etc.

In the case of *Reagan* v. *United States* (1894), 157 U. S. 301, it is true that Mr. Justice Brewer, for this Court, used the language quoted in plaintiffs in error's brief (p. 68):

> On behalf of the defendant it is its (the court's) duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the inducements to falsehood on the part of an accomplice are so great.

In that case, however, no accomplice testimony was introduced and the question of a proper instruction regarding it was not before the court. The contention there arose over the court's instruction to the jury, with relation to the testimony of the defendant himself, which was claimed to be prejudicial. Necessarily the quoted language used was for illustrative purposes only and did not establish and was not intended to establish any rule of law.

Unquestionably, in certain cases such a state of facts may be presented to the court that a conviction upon the uncorroborated testimony of a single accomplice, or even accomplices, would virtually bring about a miscarriage of justice; and in such cases it is within the discretion of the court to properly warn the jury. The case of *Sykes* v. *United States*, 204 Fed. 913, relied upon by counsel for plaintiffs in error and quoted *in extenso* in their brief (brief, pp. 64–66), falls in that class. In that case the only testimony adduced to support the defendant's conviction was, in the language of Judge Sanborn (913):

> * * * the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime.

Under such a combination of facts and circumstances the clear duty rested upon the trial court to warn the jury, if not to instruct them positively, that conviction should not be had upon the sole testimony of such a witness. The Court of Circuit Appeals properly held it—

> * * * is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it.

There is nothing in that decision, however, to overturn the common-law rule that conviction may be had upon the uncorroborated testimony of accomplices. There the court simply found that the testimony presented in that particular case did not warrant a conviction. The testimony of any witness, whether accomplice or not, which presented such a tangled maze of self-contradiction and revengeful motive as is disclosed in that case, would warrant any court in reversing a conviction based solely upon it. Indeed, Judge Sanborn stated explicitly that the action of the court in that case constituted an exception to the general rule forbidding a review of the evidence which vested the court with authority to reverse a conviction where there was no evidence to sustain it, although the question was not properly raised by "request, objection, exception, or assignment of error."

No such condition prevails here. The testimony of the accomplice witnesses is contradicted, to be sure; but that contradiction is by the defendants

themselves, and by the defendants only. The desire of the defendants to escape punishment surely furnished as impelling a motive to color favorably, or even to falsify, their testimony, as the inferential hope for immunity from punishment could induce in the accomplice witnesses against them. The court below properly instructed the jury as to both phases. As to the testimony of the defendants, careful instructions were given (pp. 39, 40).

As to the testimony of accomplices, the court, as heretofore pointed out (Rec. 40), charged fully with relation to the caution with which it should be received, the care with which it should be scrutinized, and the necessity for corroboration, if it did not produce the most positive conviction of its truth; and, in addition, fully and fairly covered the matter of motive induced by promises or hope of immunity from punishment (Rec. 36).

The words "inferential hope of immunity," employed in the argument *supra*, are used advisedly. In their brief counsel for plaintiffs in error have taken occasion to go outside the record for supposed facts upon which to base an argument. For instance, on page 59 of their brief, the statement is made:

> In this case, as has been stated above, the Government allows certain of the defendants to plead guilty and then holds over them, until their testimony has been put in evidence, the amount of sentence to which they will be subjected.

There is absolutely nothing in the record of any character to indicate that the accomplice witnesses for the Government, or any of them, were ever promised immunity, were ever allowed to plead guilty, or that sentence was ever held over them. These are matters of pure assumption on the part of counsel and have no proper place in the brief. If any such facts existed, it was the privilege of counsel to develop them upon cross-examination of the witnesses during the trial. Such a line of cross-examination, to bring out facts which, if proved, would unquestionably affect the credibility of the witnesses, was entirely proper; and the inference is cogently compelled that if any such condition existed, such a line of examination would have been pursued. In any event, the unsupported allegations in which counsel now indulge can not be considered.

Third. There is ample corroborative evidence.

The whole objection of the plaintiffs in error to the instruction of the court is, however, without merit, because, as a matter of fact, in addition to the direct testimony of the witnesses who may be considered accomplices, there was ample corroborative evidence:

1. In the testimony of Joseph Head (Rec. 25, 26) as to (*a*) the finding of a quantity of opium and a suitcase with opium stains on the inside in the house of Soo Hing Fong, one of the defendants, with whom the witnesses Joseph (Rec. 16) and Reay (Rec. 17 and 18) testified they had had telephone conversa-

tions, and to whom they had repeatedly delivered opium taken from steamers, as charged in the indictment. The witness Reay further testified (Rec. 17) to delivering opium at Soo Hing Fong's residence; (*b*) the finding of a card in Miller's home containing the telephone numbers of Charles Reay, a customs guard, and Soo Hing Fong, both defendants here; of Leong Duck, who testified to the purchase of opium from Miller a number of times; of Chung Kai, to whom the witness Joseph testified (Rec. 15, 16) opium removed from various steamers had been delivered; of the society of which Leong Duck was a member; and of Wong Bat Mon, presumably a Chinaman.

2. In the testimony of Charles A. Stephens, a witness for the defendants (Rec. 22), who stated that he had met the defendant Brennan, who had assumed the name of Nicholas, the assumption of fictitious names by various of the defendants having been charged as an overt act in the indictment and testified to by several of the accomplice witnesses.

3. In the testimony of Joseph Head (Rec. 25, 26) as to the finding in the home of Miller, another of the defendants, of $2,000 in money, wrapped in a newspaper bearing the date upon which the witness Leong Duck testified he paid Miller $120 for opium.

ANSWER TO POINT III OF PLAINTIFFS IN ERROR'S BRIEF (pp. 48-58).

VI. The objection to admission of Taylor's testimony was properly overruled; and in any event it was not prejudicial.

The assignment (No. 51, Rec. 78, 79) complains that the court erred in overruling the objection of counsel to the competency of the witness A. J. Taylor. When this witness was tendered by the Government, in response to questions propounded to him by counsel for the defense, with the permission of the court, he testified that he had recently been convicted of a felony in the southern district of California, sentenced to two years in prison, had not been pardoned, and was then an inmate of the State prison. Counsel for defense moved that the testimony of the witness be excluded, and objected to his testifying upon the ground that he was an incompetent witness because of the facts stated by him. The objection was overruled and Taylor permitted to testify. This was not error; but if it was, was not prejudicial.

First. The disqualification of the witness was not properly proved.

Assuming that conviction of a felony would have disqualified the witness, the disqualification was not properly or sufficiently proved. The witness testified merely that he had been convicted of a felony, sentenced to two years' imprisonment, had not been pardoned, and was then serving a term in the State

prison. He did not state, nor was he interrogated as to the nature of the felony of which he had been convicted, nor any details as to time, trial, court, place of conviction, etc. Counsel for defense offered no record of his conviction to sustain the objection raised.

In *Commonwealth* v. *Green* (1822), 17 Mass. 512, it was discovered subsequent to the trial and conviction that a witness who testified during the trial had been convicted of a felony in the State of New York and was therefore incompetent. This fact was set up and it was forcibly and strenuously contended that it constituted proper ground for a new trial. Chief Justice Parker disposed of the contention in clear and convincing language (p. 536):

> The objection was not made at the trial. It could not have been made at that time, for the fact was probably not then known to the prisoner, certainly not to his counsel. It is very clear that the conviction of an infamous crime and judgment pursuant to it destroys the competency of the party as a witness. But it is equally clear that whenever that objection is made to a witness it must be supported by the record of the conviction and judgment. These must be produced and offered when the witness is about to be sworn or, at furthest, in the course of the trial. If that opportunity is omitted, it is no legal cause for setting aside a verdict that such a witness has testified in the cause.

> All the books which treat of this subject are positive and express in the declaration *that the party objecting must be prepared with the record and as some of them express it, come with it in his hand or he shall not be heard against the competency of the witness.* This rule is strict, and it ought to be so; for if anything short of a record should be admitted to impeach the competency of a witness, it would be easy for parties accused to protect themselves from punishment; and it would be in most cases impossible for the witness attacked, without previous notice, to defend his reputation. Not only must infamy be proved by record, *but the objection* **shall not be heard** [italicized in text] *without a record.* For otherwise the witness might be disqualified without cause; and no man ought to be allowed to charge another with an infamous crime and thereby deprive him of his standing in court as a witness without being ready to support the charge by evidence which can not be impugned. *If the suspected witness may himself be inquired of, whether he has been convicted, or, if other evidence than the record may be given, it is only to affect his credibility;* and he may contradict the evidence by testimony in favor of his character.

Underhill on Criminal Evidence (1910), sec. 206, p. 379, states the rule thus:

> The conviction of a witness of a crime which will render him incompetent must be proved by producing the judgment of conviction of a

certified copy thereof, and *can not be proved by his oral testimony on cross-examination.*

Greenleaf, Ev. 1, sec. 370, 372.

United States v. *Biebusch* (1880), 1 McCrary, 44.

Rex v. *Castell Careinion* (1806), 8 East T. R. 79.

United States v. *Sims* (1907), 161 Fed., 1009.

People v. *Herrick* (1816, N. Y.), 7 Am. Dec., 364, and note.

See also:

Bartholemew v. *People* (1822), 104 Ill. 601; *Castellano* v. *Peillon* (1824), 2 Martin, N. S. (La.) 468, 469; *Boyd* v. *State* (1894), 94 Tenn. 508, 512.

If a witness is incompetent to testify in a case because of his conviction, it is a curious and somewhat anomalous process of reasoning that leads to the conclusion that he is competent to testify to his own incompetency. The reason of the rule excluding him, as given by the text writers, is that the infamy and moral turpitude involved in the crime of which he is convicted has demonstrated that he is incapable of or indifferent to the truth. Yet it is proposed here to prove the vital fact rendering him unworthy of belief by the same individual who is not to be believed because of that fact. The sounder conclusion clearly appears to be that if he is incompetent to testify for one purpose, he is incompetent to testify for all, and that his incompetency must be shown by the record.

Second. Conviction of smuggling does not disqualify a witness.

In his testimony given after the objection was overruled the witness testified that he had been convicted of the offense of smuggling opium across the border into the southern district of California (Rec. 21) which was not an infamous crime within the contemplation of the common-law rule. It was a misdemeanor only and did not disqualify the witness.

> Blackstone, Com., Book 4, p. 155: This (smuggling) is restrained by a great variety of statutes which inflict pecuniary penalties and seizure of the goods for clandestine smuggling, and affixes the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices.
>
> Russell's Law of Crime (1910), vol. 1, p. 371: A conspiracy to defraud the Crown of customs duties is a misdemeanor indictable at common law.
>
> Bacon, Abr. v. 9, "Smuggling."

The more open, daring, and avowed practices refer to forcible acts of smuggling (19 Geo. 2, c. 34), and involved the combination of three or more persons, the use of arms, force, or in some instances disguises. Conviction for clandestine smuggling was punishable by a fine of 100 pounds and forfeiture of the goods. Such a conviction then would not have affected the competency of a witness. A conviction for the same offense now would not disqualify a witness unless the punishment fixed brings it within

the condemnation of the common-law rule. Under the criminal code of the United States (sec. 335) every crime is denominated a felony which may be punished by "imprisonment for a term exceeding one year." Under this denomination many crimes are now felonies which were not so under the common law. To hold that conviction of crimes of that character, many of them involving no infamy and no moral turpitude, renders a witness incompetent in the courts of the United States, extends the common-law rule to limits it was never designed to reach, and is a backward step in the steady progress which has been made toward the abolition of the rule altogether—a progress which is aptly described by Mr. Justice Brewer in *Benson* v. *United States* (1892), 146 U. S. 337:

> The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

Discussing this tendency toward an abolition of the common-law rule, Wigmore on Evidence (1904), par. 519, p. 650, says:

> There can be, then, no justification for the disqualification of a person by reason of conviction of crime; and legislation has now in most jurisdictions recognized this, with more or less thoroughness, by *abolishing the common-law rule.* In a few jurisdictions, nevertheless, it remains in full scope (though defined by statute), and in many others it is retained for the crime of perjury. These anachronisms ought not to be longer countenanced.

The character of crime for which conviction disqualified a witness is fully discussed in *Ex parte Wilson* (1884), 114 U. S. 422, 423. The actual decision was as follows (p. 429):

> Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime *within the meaning of the fifth amendment of the Constitution;* and that the District Court, in holding the petitioner to answer for such a crime and sentencing him to such imprisonment without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

In view of the distinction so sharply and definitely drawn, it is quite apparent that this Court did not decide, and did not intend to decide in that case, that conviction of a crime punishable by imprisonment in the penitentiary necessarily carried with it that degree of infamy which rendered a man incompetent as a witness under the common-law rule.

This Court, in the case of *Reagan* v. *United States* (1894) 157 U. S. 301, distinctly held (pp. 303, 304) that smuggling was not a felony.

The same conclusion was reached in *United States* v. *Shepard* (1870) 1 Abb. 431 (D. C.). In that case the defendant was charged with smuggling and the court held that the offense was not infamous, although it might involve imprisonment in the penitentiary, and that conviction of it would not disqualify a witness.

See also:

United States v. *Block* (1877), 4 Sawy. 211 (D. C.).

United States v. *Sims* (1907), 161 Fed. 1008 (D. C.).

Keliher v. *United States* (1912), 193 Fed. 23 (C. C. A. 1 Cir.).

Both the *Reagan* case and the *Shepard* case, *supra*, arose and prosecutions were instituted under section 4 of the act of July 18, 1866 (14 Stat. 179), now section 3082, Revised Statutes. That section of the act is still in force, and, in the absence of any showing to the contrary in the record in this case, presumably was the statute under which the witness Taylor was indicted and convicted.

Bearing in mind the statement by this Court in the *Wilson* case, *supra*, that it was the character of the crime and not the nature of the punishment which disqualified the convict from testifying, it is difficult to perceive how the enactment of section 335 of the Criminal Code, denominating all offenses felonies

which might be punished by imprisonment exceeding one year, can now render an offense infamous within the meaning of the common-law rule which was not so before. The sounder and more rational theory is that section 335, Criminal Code, was enacted by the Congress to put a stop to the endless confusion constantly arising in the courts in the endeavor to distinguish felonies from misdemeanors in matters of practice and procedure, and that it was not contemplated and not intended to completely change the application and broaden and extend the limits of a rule gradually becoming obsolete and which in all good conscience ought to be entirely so.

It may be remarked that the common-law disqualification of witnesses convicted of crime was abolished by statute in England in 1843. (7 Vict. c. 85.)

Third. The testimony was not prejudicial to defendants.

The testimony given by the witness Taylor (Rec. 21), as heretofore pointed out, related wholly to subscriptions by certain of the defendants toward the bond and counsel fee for one Marney, charged with smuggling, and a meeting at the house of the defendant Ellison for the purpose of arranging these matters. Testimony as to the meeting at the house of Ellison and the raising of money for the purpose of securing bond and employing counsel for Marney was given by the witness Joseph (Rec. 16). The witness Reay (Rec. 18) and the witness McGough (Rec. 19) testified that they had been requested by others of the

defendants to subscribe to the fund to be used for securing bond and counsel for Marney, but declined to do so.

Eliminating Taylor's testimony entirely, there were the clear and unequivocal statements of the witness Joseph, the witness Reay, and the witness McGough to the same occurrence, each of which, standing independently and without corroboration, as they necessarily were considered under the instruction of the court, was sufficient to justify full belief in the transaction.

The defendants were charged in the indictment with eighteen other and distinct overt acts besides the one to which the witness Taylor testified. There was clear and direct testimony as to a number of these acts, and corroborative testimony as to the existence of the conspiracy. This testimony, if credible, was amply sufficient to prove the conspiracy. Subscriptions to funds for bond and counsel fees for Marney, *per se*, involved no criminality whatever, while each of the other overt acts did. *If the testimony as to the entire Marney transaction had been wholly eliminated from consideration, it would have been impossible for any reasonable mind, which attached any appreciable degree of credence to the direct and corroborative testimony of the other witnesses for the Government as to the long series of transactions, each of which involved a criminal violation of the law, to have reached any other conclusion than the jury did reach.*

Even if the witness Taylor was wholly incompetent, it is earnestly insisted that the error in admit-

ting his testimony was not prejudicial to the defendants, because:

1. He testified to but a single transaction out of nineteen overt acts charged, was one of four testifying to that particular transaction, was a self-confessed convict with weakened credibility, the transaction was sufficiently proved by the testimony of any one of the other witnesses, none of whom he could corroborate, and his testimony could have had but slight, if any, effect upon the minds of the jury.

2. All of the testimony as to subscriptions to bond and counsel fees for Marney could have been wholly eliminated from consideration without weakening the Government's case to any appreciable extent.

As stated by Mr. Chief Justice Fuller in *Mammoth Min. Co.* v. *Salt Lake Machine Co.* (1894), 151 U. S. 447, 451:

> The evidence thus objected to was cumulative in its character and not of controlling importance, and, if excluded, it is sufficiently clear that the result would not have been otherwise than it was.

See also *Cooper & Co.* v. *Coates & Co.* (1874), 21 Wall. 110. The same rule applies with respect to criminal cases.

Motes v. *United States* (1899), 178 U. S. 458.

Fourth. Plaintiffs in error have admitted that the testimony was immaterial.

The plaintiffs in error assigned as error (No. 43) the failure of the court to charge that the Marney subscription fund evidence did not constitute evidence of an overt act. They have not discussed this assign-

ment in their brief and hence have waived it. Assuming, however, that their contention was correct and that it did not constitute evidence of an overt act, then it was evidence of an entirely immaterial and irrelevant fact, and Taylor was in the position of a witness who has testified to a purely immaterial fact, and hence his testimony was not prejudicial.

ANSWER TO POINT II OF PLAINTIFFS IN ERROR'S BRIEF. (PP. 45–48.)

VII. The court did not err in admitting the testimony of witness Head as to the finding of $2,000 in the home of the defendant Miller.

First. The testimony was relevant.

In brief, the witness Head testified (Rec. 25, 26) that during his search of Miller's flat on July 3, 1913, under a search warrant, which was exhibited on trial, he found $2,000 wrapped in a San Francisco newspaper of date *July 2, 1913*, in a bureau drawer in a room in the flat. Upon cross-examination the witness testified that he found the money in a room in Miller's flat occupied by a man named Hammel, and that Hammel claimed it was his money; that later he ascertained that Hammel was an employee of the Pacific States Telephone Company and had been employed as an inspector of lines for approximately a year. It may be remarked here that nothing whatever is shown in the record to indicate that Hammel had any connection with the offense charged against the defendants, and no further testimony with relation to him was introduced.

The witness Leong Duck testified (Rec. 21) that he knew the defendant Miller, had been at his residence, giving the street number in the city of San Francisco, about seven or eight times; that he was there on *July 2, 1913*, was arrested about a block and a half away, a package taken from him which he had gotten from Miller, for which he paid the latter $120, and that he had obtained many similar packages from him.

In support of their contention that Head's testimony was irrelevant, immaterial, and incompetent, and constituted prejudicial error, plaintiffs in error rely upon the case of *Williams* v. *United States*, 168 U. S. 382. An analysis of that case clearly develops that it differs materially from that at bar. The defendant there was convicted of extortion while acting as a United States Chinese inspector. No charge of conspiracy was involved. Over objection, the Government introduced evidence showing that the defendant had $4,750 deposited in bank.

The trial court, in effect, instructed the jury that the failure of the defendant to account for the possession of this $4,750, when his salary was not in excess of $150 per month, was sufficient evidence to warrant a conviction for extorting $185.

This court held both the instruction and the admission of the evidence erroneous, for lack of sufficient connection between the testimony and the offense charged, no deposits of sums approximating the amounts charged to have been illegally received having been shown.

The case at bar stands on a different footing. It must be borne in mind that it involves a charge of conspiracy, an offense which often can be proved by indirect and circumstantial evidence only. It is unusual for a man to keep in his home as large a sum of money as was found in the defendant Miller's flat, not secreted, but merely wrapped in a newspaper and placed in a bureau drawer. This logical inference is that the money had been placed there only temporarily and recently, and the date of the newspaper in which it was wrapped indicated that it had been done no earlier than the day before. The testimony of the witness Leong Duck that he had paid Miller the sum of $120 on that day, when considered in connection with the testimony of various other witnesses as to the quantities of opium Miller had removed from divers steamships, some of which had been delivered to his residence, and his numerous and extensive dealings with a number of Chinamen in disposing of the opium so removed, establishes such a logical connection between the finding of the money under the circumstances detailed and the testimony of the other witnesses, and especially the witness Leong Duck, as to render it material and relevant and take it entirely out of the decision in the *Williams* case. Certainly it tends to corroborate the testimony of some of the accomplice witnesses.

In the *Williams* case, too, this court criticized both the instruction and the admission of the testimony and found other reversible error.

The record here does not show that any effort was made or any testimony introduced by the prosecution to show Miller's financial condition, income, salary, manner of life and habits of expenditure, or environment, as suggested by counsel for plaintiffs in error on page 48 of their brief. In the absence of any attempt to make such proof or any reference whatever to the matter, it is clear that no such inference was sought to be established by the prosecution here as in the *Williams* case.

Second. The testimony was not prejudicial.

Assuming, however, that the admission of Head's testimony as to the finding of the money was error, and that standing alone it might have been prejudicial to the defendants, it was neutralized by his testimony on cross-examination to the effect that the money was found in the room of a man who claimed it as his own, and who is not shown to have had the slightest connection with the conspiracy. In view of the fact that the court gave no instruction to the jury which had any tendency to cause them to attach any particular weight to the testimony of this witness, it seems apparent that its admission, if erroneous, was not prejudicial.

CONCLUSION.

The judgment of the District Court should be affirmed.

CHARLES WARREN,
Assistant Attorney General.

JANUARY, 1915.

○

BROLAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 645. Submitted January 5, 1915.—Decided February 23, 1915.

In a case from the District Court, if the power to review attaches because of a constitutional question, that authority gives rise to the duty of determining all the questions involved, including those that otherwise are within the exclusive jurisdiction of the District Court, but if the constitutional question asserted as the basis for jurisdiction of this court is frivolous, this court has no power to review it or any of the other questions involved. The writ of error must be dismissed.

The absolute power expressly conferred upon Congress to regulate foreign commerce involves the existence of power to prohibit importations and to punish the act of knowingly concealing or moving merchandise which has been imported in successful violation of such prohibition. *Keller* v. *United States*, 213 U. S. 138, distinguished.

The contention in this case that § 2 of the Act of February 9, 1909, c. 100, 35 Stat. 614, regulating the importation of opium, is unconstitutional as beyond the power of Congress, has been so foreclosed by prior decisions of this court that it is frivolous and affords no basis for jurisdiction of this court under § 238, Judicial Code.

THE facts, which involve the jurisdiction of this court under § 238, Judicial Code, are stated in the opinion.

Mr. Edward M. Cleary, Mr. John L. McNab, Mr. Bert Schlesinger, Mr. S. C. Wright and *Mr. P. S. Ehrlich*, for plaintiffs in error.

Mr. Assistant Attorney General Warren for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The indictment against the plaintiffs in error contained two counts: The first charged a conspiracy to wrongfully import opium into the United States in violation of the first portion of § 2 of the act of February 9, 1909, c. 100, 35 Stat. 614. The second charged a conspiracy to unlawfully receive, conceal and facilitate the transportation of opium which had been wrongfully imported into the United States with knowledge of such previous, illegal importation in violation of the latter part of the section referred to. The first count was quashed on the ground that the overt acts alleged occurred after the illegal importation or smuggling which was counted on. On the second count there was a conviction and sentence and this direct writ of error to the trial court is prosecuted to reverse the same. The right to a reversal rests upon two propositions: the one, that the clause of the section upon which the second count was based is repugnant to the Constitution of the United States because beyond the legislative power of Congress to enact and because moreover its provisions intrinsically constitute a usurpation of the powers reserved to the States by the Constitution; and the other, the insistence that various material errors were committed by the trial court during the progress of the case aside from the constitutionality of the statute.

Our jurisdiction to directly review depends upon the constitutional question since the other matters relied upon are as a general rule within the exclusive jurisdiction of the Circuit Court of Appeals of the Ninth Circuit, although if power to review attaches to the case because of the constitutional question, that authority gives rise to the

duty to determine all the questions involved. *Burton* v. *United States*, 196 U. S. 283; *Williamson* v. *United States*, 207 U. S. 425, 432; *Billings* v. *United States*, 232 U. S. 261, 276. Under these circumstances to prevent a disregard of the distribution of appellate power made by the Judicial Code and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because although in form arising it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Hendricks* v. *United States*, 223 U. S. 178.

Coming to that subject the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention. In *Buttfield* v. *Stranahan*, 192 U. S. 470, in stating the previously settled doctrine on the subject it was said, p. 492:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes,

but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237, chap. 70; Rev. Stat., § 2933, U. S. Comp. Stat. 1901, p. 1936." And see *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 334, 335; *The Abby Dodge*, 223 U. S. 166, 176.

Nor is there any ground upon which to rest the contention that although under this settled doctrine it is frivolous to question the power of Congress to prohibit importations and punish a violation of such prohibition, it is open to controversy and therefore not frivolous to contend that there is a want of power to prohibit and punish the act of knowingly concealing or moving merchandise which has been successfully imported from a foreign country in violation of the prohibitions against such importations. This conclusion is inevitable since it is obvious that to concede that the wrongful and successful evasion of the prohibition against bringing in imported merchandise or of knowingly, in violation of a further prohibition, dealing with such merchandise was beyond the scope of the complete power to prohibit importation, would be in substance to deny any power whatever. Indeed, it is evident that a power to prohibit which is operative and effective only as long as its prohibitions are not disobeyed is not an absolute power but is scarcely worthy of being denominated a relative one. But the authority being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its com-

mands to the control of those things which are essential to make the power existing and operative,—a conclusion, the truth of which cannot be escaped in the light of the doctrine on that subject, so luminously stated in *Gibbons* v. *Ogden*, 9 Wheat. 1, and which has been the guide by which the Constitution has been successfully interpreted and applied from that day to this.

While these considerations demonstrate that the attempted distinction is but a denial of the existence of a power which it is conceded it would be frivolous to deny, we briefly refer to the legislative history from the beginning for the purpose of showing that the authority which it is now insisted was not included in the right to prohibit importation has at all times been considered to be and treated as within the scope of such authority. Thus in 1799 the Customs Act of that year (March 2, 1799, § 69, chap. 22, 1 Stat. 627, 678) contained a provision for a seizure and forfeiture of merchandise imported in violation of its terms and imposed penalties upon any person who should "conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act." And by the act of March 3, 1823 (chap. 58, 3 Stat. 781), amending the act of March 2, 1821 (chap. 14, 3 Stat. 616) a like authority was asserted and penalties and forfeitures were imposed for violations. Again in 1866 in an act to prevent smuggling (§ 4, act of July 18, chap. 201, 14 Stat. 178, 179) the identical provisions found in the section here in question were made applicable generally to all importations and were sanctioned by making violations thereof criminal. And these provisions passed into the Revised Statutes (§ 3082), and are in force today, the particular provision here involved concerning opium being part of the act of 1909 prohibiting the importation of that article. In the face of this unbroken legislative interpretation of the extent of the power to prohibit covering a period of more than one hundred and

fifteen years, of the constant exertion of administrative authority under such legislation and of the assumption that such power undoubtedly obtained, manifested by a multitude of judicial decisions too numerous to refer to although many of them are cited in the argument of the Government, we can discover no possible ground upon which the contention to the contrary here relied upon can rest, and therefore the conclusion that it is wholly unsubstantial and frivolous cannot possibly be escaped.

In the argument it is however suggested that some support for the view relied upon results from the ruling in *Keller* v. *United States*, 213 U. S. 138, wherein a provision of the act known as the White Slave Act (Feb. 20, 1907, chap. 1134, 34 Stat. 898) was held to be beyond the power of Congress to enact. In fact the provisions of that statute are printed in a parallel column with the statute here assailed and the conclusion is drawn that the identity between them is perfect and therefore, despite the considerations involved in the review which we have made, it has come to pass not only that the assertion of the want of power in Congress here relied upon is not frivolous, but that it is well founded and must be upheld if the *Keller Case* is not to be overruled. But the contention is itself frivolous since it is based upon a mere failure to observe the broad line which separates the ruling in the *Keller Case* from the question here involved. Nothing can make this plainer than the mere statement that while in the *Keller Case* it is true there was a prohibition against the importation for immoral purposes of the persons whom the statute enumerated, the act punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral purposes if they were aliens even although they had come into the United States lawfully. The basis upon which the *Keller Case* proceeded

was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act (March 26, 1910, § 2, c. 128, 36 Stat. 263, 264).

In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand. In fact it is true to say of the citation of these cases as well as of the reference to the *Keller Case* that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of all merit and frivolous.

There being no possible ground upon which to attribute even semblance of foundation for the constitutional question relied upon, it follows that it affords no basis for our jurisdiction to directly review and the writ of error is

Dismissed for want of jurisdiction.